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No. 90-1123

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DONALD GAIGALAS AND RONALD L. TUCKER,
Petitioners,

v.

BARBARA BUFFINGTON AND DAVID BUFFINGTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

WILLIAM F. GATELY
DANIEL W. WHITNEY *
SEMMES, BOWEN & SEMMES
250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040
Counsel for Respondents

* Counsel of Record

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BRIEF IN OPPOSITION

Respondents, Barbara Buffington and David Buffington, respectfully request that the petition for issuance of a writ of certiorari be denied.

STATEMENT OF THE CASE

Barbara Buffington and David Buffington, respondents herein, adopt and incorporate by reference their "Statement of the Case" previously submitted in connection with their Petition for a Writ of Certiorari (No. 90-1071) which was filed on January 3, 1991.

SUMMARY OF ARGUMENT

Both questions presented by the officers were not raised or litigated in the district court. For the first time since the inception of this litigation, the officers' Petition contends that the Due Process Clause affords no protection

to a person in police custody who is known to be on the verge of suicide. In the district court, however, the officers at all times conceded that they had the duty to protect persons in their custody who are known to be suicidal. Instead, the officers' defense at trial, as consistently advocated by their trial counsel, was that the officers did not know that James Buffington was suicidal, and therefore they could not be found deliberately indifferent to his serious medical needs.

Even if petitioners had properly preserved the issue, it is clear that the Fourth Circuit properly held, in conformity with uniform federal decisional law, that police officers have a constitutional duty not to be deliberately indifferent to a person in their custody who is known to be suicidal and in need of emergency intervention.

The second question raised by petitioners was also not properly preserved for consideration by this Court. The qualified immunity defense was not raised in pretrial motions, and was not asserted by the officers when they unsuccessfully moved at trial for a directed verdict. The Fourth Circuit correctly found that the officers failed to preserve the issue for appellate review. Moreover, in the factual context of this case, the defense is inapplicable. The defense does not apply to this case because the officers conceded that they had the duty to safeguard a detainee who was known to be suicidal. Thus, this case does *not* present the issue of whether police officers have the duty to screen prisoners in order to detect *latent* suicidal tendencies.

REASONS FOR DENYING THE PETITION

I. THE OFFICERS' DUE PROCESS ARGUMENT SHOULD NOT BE CONSIDERED BECAUSE IT WAS NOT RAISED OR LITIGATED IN THE LOWER COURTS

Officers Gaigalas and Tucker assert that the Fourth Circuit erred in holding that police officers have a constitutional duty not to be deliberately indifferent to a de-

tainee known to be suicidal and in need of emergency psychiatric care. Petitioners take issue with the Fourth Circuit holding that the jury was properly instructed that they could find the officers liable under § 1983 "if it found that they knew that Buffington was suicidal and in need of emergency intervention, but nevertheless acted with deliberate indifference in failing to take any steps to prevent the suicide." Petition Appendix at p. 10. The officers contend that this holding is "inconsistent with this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)." Petition at p. 10. Officers Gaigalas and Tucker assert that Buffington's suicide resulted from his own *private* conduct, and therefore they had no constitutional duty to protect him from suicide. Petition at p. 10. The officers assert that the Fourth Circuit erred in focusing on the fact of custody as opposed to the "source of the harm":

> Focusing on the fact that Buffington was in the custody of the police at the time he committed his suicide, the court of appeals failed to accord the necessary weight to the fact that Buffington's resolve to commit suicide was not created or controlled by state actors. Thus, the court ignored that portion of the *DeShaney* decision that the source of the harm is a significant factor in determining whether the State owes an affirmative constitutional duty. . . . Because it fails to accord any weight to the fact that the harm to Buffington resulted directly from his own *private* conduct, the holding of the Fourth Circuit is inconsistent with the constitutional principles set forth in *DeShaney*.

Petition at p. 10 (emphasis original). This argument will hereafter be referred to as petitioners' "*DeShaney*-private action" argument.

The officers also argue that the Fourth Circuit's holding is "squarely inconsistent" with the Sixth Circuit's decision in *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990). Petition at

p. 11. According to the officers, "[i]n *Danese*, the Sixth Circuit held that, as a matter of law, there is no due process right to be protected from suicide." Petition at p. 11.[1]

The "*DeShaney*-private action" argument has now surfaced for the first time since the inception of this litigation. However, if the officers had wished to litigate this issue, it should have been raised in the officers' pretrial motions to dismiss and at the required time during trial. The officers failed to raise this issue at the following stages of this litigation:

—It was not raised in defendants' "Motion To Dismiss Or, In The Alternative, Motion For Summary Judgment" filed 1/20/88 (App. 1a-10a).[2]

—It was not raised in defendants' "Motion To Dismiss The Amended Complaint, Or In The Alternative, Motion For Summary Judgment" filed 9/8/88 (App. 11a-19a).

—It was not raised in defendants' "Motion For A Directed Verdict And For Judgment Notwithstanding The Verdict" filed 12/2/88 (App. 20a-25a).

—It was not raised at the close of plaintiffs' case on 1/12/89 (App. 26a-28a).

—It was not raised at the close of all the evidence in the case on 1/12/89 (App. 29a-35a).

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[1] The officers raise the specter that the Fourth Circuit's holding will require government to provide suicide-proof facilities and "expensive monitoring equipment." Petition at p. 12. Actually, the plaintiffs' expert, Joseph Rowan, was the only witness at trial who spoke to the issue of the expense of jail suicide prevention. Mr. Rowan testified that "[t]raining is the most important aspect of suicide prevention," (Apx. 1582) and that such training is "very inexpensive." (Apx. 1608). References to the district court transcript included in the record below are styled "Apx. ——".

[2] References to the appendices bound with respondents' Brief in Opposition are styled "App. ——".

—It was not raised in defendants' exceptions on 1/17/89 to the district court's instructions. (App. 39a-43a).

—It was not raised in "Motion Of Defendants For A Directed Verdict And For Judgment Notwithstanding the Verdict" filed 1/27/89. (App. 44a-50a).

Moreover, although the officers' Fourth Circuit appellate brief relied upon *DeShaney*, and thereby raised a due process argument for the first time, the officers' brief raised a materially different due process argument (discussed *infra* at pp. 11-12) than the one contained in the officers' Petition.

The officers' defense at trial was not based on the claim that the Due Process Clause provided no protection to a suicidal detainee. Instead, the officers defended on the basis that a § 1983 action could not be based on mere negligence, and absent knowledge that Buffington was suicidal, the officers were at most merely negligent.

Based on their negligence defense, the officers moved for a directed verdict at the close of the evidence offered by the Buffingtons. The officers' trial counsel stated:

> The first point is with respect to the civil rights claim under Section 1983. The standard must be proof of deliberate indifference of the various individual defendants involved, including Chief Behan, and deliberate indifference is synonymous with wanton neglect, with willful misconduct in regard to the serious medical needs of persons such as Mr. Buffington.

(App. 27a). Thus at trial the officers conceded that a "deliberate indifference" standard was applicable.[3] The officers did not move for directed verdict on the basis that Buffington's suicide resulted from a *private* act

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[3] It should be noted that plaintiffs did not agree with the officers' definition of "deliberate indifference." *See* footnote 7, *infra*.

which did not implicate the protections afforded by the Due Process Clause. Instead, the officers' defense at trial was premised on the notion that the Buffingtons, in reality, had no more than a negligence suit, and that negligence was not actionable under § 1983. In moving for a directed verdict the officers stated:

> The claims against the individual Defendants are founded in negligence theories asserting claims under Section 1983. However, since the claims are merely for negligence, it is plain that these claims are not actionable. *See Daniels v. Williams*, 106 S.Ct. 666 (1986) and *Davidson v. Cannon*, 106 S.Ct. 668 (1986). Further the evidence at trial in these proceedings fail (sic) to demonstrate more than mere negligence. At best, the testimony generated proof only of errors of judgments or an inadvertent failure to take appropriate action. Such conduct does not amount to 'deliberate indifference.'

(App. 22a). In moving for directed verdict the officers further stated: "Evaluating the conduct of the officers as of March 19, 1987, it is plain that the standard of deliberate indifference to serious medical needs is a standard that was applicable as of that date. . . . A straightforward application of the requirement of deliberate indifference plainly requires a dismissal of the Federal claims against each of the Defendants." (App. 25a).

It is settled that the failure to raise a question in a motion for directed verdict waives appellate review of that issue. *E.g., Tights, Inc. v. Acme-McCary Corp.*, 541 F.2d 1047, 1058 (4th Cir. 1976).

When the officers moved for a directed verdict at the close of all of the evidence they again failed to assert that a suicidal detainee such as Buffington was not entitled to any due process protection. Instead the officers essentially renewed the arguments made at the close of plaintiffs' case. Defense counsel stated as follows:

> Again with respect to Officer Gaigalas, he testified that he knew of the emergency evaluation but not

> that the gentlemen was suicidal. There is a lack of knowledge in his circumstances, and again there are (sic) testimony at best generally not deliberate indifference but only proof of errors in judgment or inadvertence and at best negligence, and negligence has never amounted to deliberate indifference. In fact, the Supreme Court held that negligence is not actionable under Section 1983; and again the leading cases on that are Daniels versus Williams [and] Davidson versus Cannon. Again, in one of those cases a correctional officer was sued because he had not passed along a note that contained threats, and the court held that failure to pass along was inadvertence. He was negligent but was not culpable under Section 1983. . . . As to all of these officers that same standard should apply with respect to 1983.

(App. 34a). The district court reserved ruling on the officers' motion for directed verdict, and the case went to the jury.

The jury was instructed as to the nature of the constitutional duty owed by the officers to Buffington:

> Police officers have a specific constitutional duty to provide needed medical care to the persons within their custody. The constitution requires that medical care be given for psychological and psychiatric ills as well as physical ills. The Constitution is violated by deliberate indifference to a serious medical need of a detainee.
>
> * * * *
>
> As part of the constitutional duty to provide medical care, the constitution requires that police officers protect a detainee from committing suicide if they are aware that the person in their custody is suicidal and needs emergency psychiatric treatment. The failure to do so can amount to deliberate indifference in the constitutional sense.
>
> Now, on the other hand, you are instructed that those who confine a detainee cannot be placed into a position of guaranteeing that a detainee will not

> commit suicide if they have no knowledge that he is suicidal.

(App. 37a-38a).[4] These instructions were the product of three charging conferences in which the district court and counsel went over proposed instructions word-by-word. (App. 39a; 43a). As a part of this tedious and time consuming process, the district court made those changes that "reflected the discussion of everyone." (App. 43a).

After the district court instructed the jury, counsel for the officers did not argue that the officers owed no duty to Buffington for the reason that "his resolve to commit suicide was not created or controlled by state actors." *See* Petition at p. 10. Instead, counsel for the officers objected on the basis that a suicidal detainee does not have a serious medical need:

> The law is the officers have a duty to give medical care and not be deliberately indifferent to medical needs. There is no constitutional standard requiring inmates to be protected from committing suicide.

(App. 40a). "An exception on one ground cannot serve as the basis for another, on a different ground, on appeal." *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 809 (1st Cir.), *cert. denied*, 109 S.Ct. 392 (1988). The officers thus failed to comply

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[4] There is "no sound underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart." *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977). The "deliberate indifference" standard of *Estelle v. Gamble*, 429 U.S. 97 (1976), applies both to the constitutional adequacy of psychological or psychiatric care provided at a prison. *Inmates of Allegheny City Jail v. Pierce*, 612 F.2d 754, 763 (3rd Cir. 1979). Treatment of mental disorders of mentally disturbed inmates may constitute a "serious medical need." *E.g., Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). Additional authorities are cited in footnotes 9 and 15, *infra*.

with the requirement of Fed. R. Civ. P. 51 that an objection must be specifically stated in order to preserve the point for appellate review.

In moving for judgment notwithstanding the verdict, the officers again failed to raise the argument that the deliberate indifference standard did not apply to harm resulting from Buffington's "own private conduct." Instead, the defendants argued, as they had before, that Officers Gaigalas and Tucker were not deliberately indifferent to Buffington's serious medical needs. The memorandum in support of the Motion for Judgment Notwithstanding the Verdict stated as follows:

> Further, there is no evidence that Officer Tucker was deliberately indifferent to Mr. Buffington's serious medical needs, or that he even had actual notice of the nature and extent of Mr. Buffington's medical needs. As has been repeatedly argued throughout these proceedings, proof of deliberate indifferent (sic) requires evidence which clearly demonstrates knowledge of the medical need in question and conduct with respect to the prisoner and the known medical need that wantonly or recklessly disregarded the seriousness of the medical need. . . . As to Officer Tucker, there is no evidence that he had knowledge of the full nature and extent of Mr. Buffington's emotional deterioration sufficient to require him to intervene and overrule Officer Gaigalas' handling of the situation. In short, there is no conduct on his part that was deliberately indifferent to a known serious medical need of Mr. Buffington.

(App. 49a).

Similarly, the defense of Officer Gaigalas was singularly premised on the contention that he was at best merely negligent:

> The evidence adduced against him demonstrates mere errors in judgment on his part or an inadvertent failure to take appropriate action by maintaining Mr. Buffington at the bar. . . . [T]he jury's

> verdict against Officer Gaigalas must have plainly rested upon findings by them that he was merely negligent in his conduct with respect to the safety of Mr. James Buffington.

(App. 49a-50a).[5] The district court denied the defendants' motion.

Although the Buffingtons have agreed from the outset of this case that a § 1983 action cannot be premised on mere negligence, issue was joined at trial on the question of whether the officers' conduct constituted "deliberate indifference." This question in turn reduced ultimately to the question of whether the officers knew that Buffington was suicidal prior to placing him in an unmonitored cell. At no time during the pretrial or trial phase of this case did the officers dispute that a § 1983 right to relief existed if the Buffingtons could prove deliberate indifference.

Because the officers' "*DeShaney*-private action" argument is made for the first time in the petition for writ of certiorari, the Court should decline to consider it. *See, e.g., City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts. . . . That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction. . . ."); *Miree v. De Kalb County*, 433 U.S. 25, 34-35 (1977) ("The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it.").

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[5] Apropos petitioners' emphasis on the expense that supposedly will be incurred if the Fourth Circuit's holding is affirmed, it is obvious that there is no cost involved in keeping a known suicidal subject at the booking desk pending transport to the hospital for an emergency psychiatric evaluation.

A. The Fourth Circuit Correctly Analyzed the Duty of Care Owed to Known Suicidal Detainees

If the Court should find that the issue is properly presented for consideration, it is clear that the Fourth Circuit correctly disposed of this issue. Although the Buffingtons had argued that the issue should not be considered in light of the fact that it was raised for the first time on appeal (Appellees' Brief at p. 30), the Fourth Circuit nevertheless addressed the merits. The *DeShaney* argument presented in the Fourth Circuit was a significantly different argument than now presented to this Court.[6] As noted by the Fourth Circuit, the officers contended in the circuit court that no constitutional duty was owed to a person who was in police custody as the result of a family request for assistance as distinct from the duty owed to a suicidal prisoner as the result of an arrest for criminal violation or by virtue of a conviction. For ease of reference, this argument is referred to as the "*DeShaney*-family request/no arrest" argument. The Fourth Circuit stated the officers' argument as follows:

> Specifically, the appellants contend that the due process clause of the fourteenth amendment does not require the state to take any steps to prevent a person in its custody from committing suicide when the state has intervened not to enforce criminal law, but at the request of family members to protect the person from causing harm to himself. We reject this argument.

Petition Appendix at 8a. The Fourth Circuit correctly recognized that the officers had misread *DeShaney*:

> The appellants argue that under the rationale of *DeShaney*, there was no affirmative duty of care on the part of any state actor in this case because the

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[6] The officers' Fourth Circuit brief conceded that there is a "substantial corpus of law" recognizing the "prisoner's or detainee's right to protection from suicide through the provision of medical care and treatment." (App. 54a).

> intervention to protect Buffington was at the instance of private parties. This is a misreading of *DeShaney*. Distinguishing prior cases in which it had found affirmative constitutional duties of protection from the situation in *DeShaney*, the Court explained that in those earlier cases it was the fact of state *custody* that triggered at least some duty of care on the part of the state: '[W]hen the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.' *Id.* 109 S.Ct. at 1005-06 (citations omitted). Nothing in the Court's rationale for finding that some affirmative duty arises once the state takes custody of an individual can be read to imply that the existence of the duty somehow turns on the reason for taking custody. . . . Nor do we read *DeShaney* or other cases as implying that it is relevant to the existence of the duty whether a state or private actor brought the need for custody to the state's attention. *See Youngberg*, 457 U.S. at 309, 102 S.Ct. at 2454 (involuntarily committed mental patient's mother sought son's commitment because she was unable to care for him or control his violence). In short, we see no basis for adopting the categorical rule urged by appellants that the state owed no duty of care to Buffington under the circumstances of this case. We hold that the due process clause did impose an affirmative obligation on the state to provide some measure of care here.

Petition Appendix at 9a-10a. *DeShaney* involved a child's § 1983 claim against a county department of social services for its failure to protect him against his father's violence. The Supreme Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process

Clause." 109 S.Ct. at 1004. The Court based its holding on the fact that the harm to the child "did not occur while he was in the State's custody, but while he was in the custody of his natural father . . . ." *Id.* at 1006. This fact distinguished the case from other situations where the Court has found duties of care. For example, in *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court held that the Eighth Amendment requires the provision of adequate medical care to prisoners.[7] The Court in *DeShaney* noted that *Youngberg v. Romeo*, 457 U.S. 307 (1982), similarly held that the Fourteenth Amendment requires the State to provide involuntarily committed mental patients with services necessary to insure their "reasonable safety." *Id.* at 314-324. The Court also noted the holding in *Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), that the Due Process Clause requires government officials to provide medical care to suspects in police custody.[8] The Court in *DeShaney* stated that these cases "stand . . . for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-

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[7] In *Estelle*, the Court held that "deliberate indifference to a serious medical need of a prisoner violates the Eighth Amendment." 429 U.S. at 104. "Deliberate indifference" exists when action is not taken in the face of "a strong likelihood, rather than a mere possibility" that failure to provide care would result in harm to the prisoner. *E.g., State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1146 (7th Cir.), *cert. denied*, 464 U.S. 995 (1983).

[8] The Eighth Amendment's protection applies only to prisoners incarcerated as a result of a criminal conviction. *Ingraham v. Wright*, 430 U.S. 651, 668-671 (1977). There exists an equivalent substantive right under the Due Process Clause of the Fourteenth Amendment which protects pre-trial detainees. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Eighth Amendment standards are used by analogy to determine the rights of a detainee. *E.g., Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978), *cert. denied*, 446 U.S. 928 (1980).

being." 109 S.Ct. at 1005. Thus it is the fact of custody alone which triggers the obligation to provide medical care. Accordingly, in this case the officers had a constitutional duty to provide Buffington with such protection.[9]

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[9] The courts have uniformly recognized that § 1983 liability can be premised on deliberate indifference to a known suicidal detainee. *See Burns v. City of Galveston*, 905 F.2d 100, 103 (5th Cir. 1990) (deliberate indifference to serious medical needs of suicidal pretrial detainee constitutes due process violation); *Belcher v. Oliver*, 898 F.2d 32 (4th Cir. 1990) (a jailor with knowledge of detainee's suicide risk can be charged with deliberate indifference); *Lewis v. Parish of Terrebone*, 894 F.2d 142, 145 (5th Cir. 1990) (warden at jail had clear and well-established constitutional duty to protect a prisoner prone to suicide from self-destruction); *Waldrop v. Evans*, 871 F.2d 1030, 1033 (11th Cir. 1989) (failure of prison staff member to notify competent officials of inmate's dangerous psychiatric state can constitute deliberate indifference); *Edwards v. Gilbert*, 867 F.2d 1271, 1276 (11th Cir. 1989) (deliberate indifference standard is met if there is a strong likelihood that self-infliction of harm would result from failure to act); *Colburn v. Upper Darby Township*, 838 F.2d 663, 668-69 (3d Cir. 1988), *cert. denied*, 103 L.Ed.2d 808 (1989) (even where the acts causing the injury were those of the prisoner, herself, police officers had duty to protect openly suicidal pretrial detainee); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1181 (5th Cir. 1986) (failure to take any steps to save openly suicidal detainee from injuring himself constitutes a due process violation); *Roberts v. City of Troy*, 773 F.2d 720, 724 (6th Cir. 1985) (§ 1983 claim is established when suicidal detainee alleges that official failed to take steps in the face of a pervasive risk of harm); *Bell v. County of Washington*, 741 F. Supp. 1354, 1360 (S.D. Iowa 1990) (if jailer is aware of prisoner's particular vulnerability to suicide, the Fourteenth Amendment imposes the obligation on him not to be deliberately indifferent to that vulnerability); *Jackson v. City of Chicago*, 645 F. Supp. 926, 927-28 (N.D. Ill. 1986) (detainee in known state of mental distress entitled to medical care); *Strandell v. Jackson County*, 634 F. Supp. 824 (S.D. Ill. 1986) (where suicidal detainee was in obvious state of mental suffering there was a duty to provide medical care); *Holland v. Breen*, 623 F. Supp. 284 (D. Mass. 1985) (complaint stated a cause of action for violation of due process rights where pretrial detainee was in obvious danger of committing suicide); *Madden v. City of Meriden*, 602 F. Supp. 1160 (D. Conn. 1985) (police officers who failed to protect detainee with

II. THE QUALIFIED IMMUNITY DEFENSE WAS NOT PRESERVED AT TRIAL

Petitioners further assert that the Buffingtons' § 1983 action against the officers "should have been dismissed as barred by qualified immunity." Petition at p. 14. Petitioners rely upon the Sixth Circuit's decision in *Danese v. Asman*, 835 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990). Petitioners assert that "[e]ven if due process does create a constitutional duty to prevent a suicide, it clearly was not a duty so firmly established in 1987 that liability can be imposed for breach of that duty by these officers." Petition at p. 14. The officers contend that the Buffingtons' § 1983 claims are barred by qualified immunity and that the Fourth Circuit erred when it found that the defense had been waived.

Prior to addressing whether the officers preserved the defense of qualified immunity, a brief discussion of the elements of this defense will provide some context to the waiver issue. An analysis of the qualified immunity defense begins with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow* the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages inso-

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known history of suicide liable for violation of due process rights); *Guglielmoni v. Alexander*, 583 F. Supp. 821 (D. Conn. 1984) (constitutional duty exists to protect openly suicidal inmate from himself); *see also Darling v. Augusta Mental Health Institute*, 535 A.2d 421 (Me. 1987) (deputy sheriffs had duty to provide for openly suicidal inmate's serious medical needs); *Seiler v. City of Bethany*, 746 P.2d 699 (Okl. App. 1987) (prison officials had duty to provide for serious medical needs when faced with strong likelihood of prisoner's suicide); *Miga v. City of Holyoke*, 398 Mass. 343, 497 N.E.2d 1 (1986) (police officer's conduct in failing to protect openly suicidal pretrial detainees could constitute deliberate indifference in violation of due process rights); *Brewer v. Perrin*, 132 Mich. App. 520, 349 N.W.2d 198 (1984) (police could be held liable for the failure to provide medical attention to openly suicidal pretrial detainee).

far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The *Harlow* Court established an objective standard to make summary judgment appropriate where an official has violated a plaintiff's constitutional rights—if they were not then "clearly established" or if a "reasonable person" in the official's position could have failed to understand that his conduct violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). A qualified immunity defense thus has three aspects to it:

> In analyzing a claim of qualified immunity it is therefore necessary first to identify the specific constitutional right allegedly violated, then to inquire whether at the time of the alleged violation it was clearly established, and then further to inquire whether a reasonable person in the official's position would have known that his conduct would violate that right.

Collinson v. Gott, 895 F.2d 994, 998 (4th Cir. 1990) (Phillips, J., concurring). With these basic principles in mind, the analysis can now turn to whether the officers actually raised a qualified immunity defense in this case.

The defense of qualified immunity was not raised in their first responsive pleading. The officers' two-page "Motion to Dismiss or, In the Alternative, Motion for Summary Judgment" reveals no discussion of qualified immunity. (App. 1a-2a.) In fact, the words "qualified immunity" are absent. Although the memorandum accompanying that motion did cite *Harlow*, the officers focused exclusively upon the absence of a constitutional duty to protect *latently* suicidal detainees. (App. 4a). The officers argued that a *latently* suicidal detainee had no constitutional right to be protected from committing suicide while in police custody. This argument was based on a gross misreading of the Buffingtons' Complaint (*see*

Apx. 26-34), which manifestly alleged that James Buffington was *openly and obviously* suicidal while in police custody. Their motion proceeded to mischaracterize the Complaint as alleging a duty to discover and protect against a detainee's *latent* suicidal tendencies. (App. 4a-8a). Based on this false premise, they argued that the Complaint alleged *mere negligence* and for that reason failed to state a due process violation. (App. 9a-10a).

The officers' memorandum in support of summary judgment stated that, in order for the Buffingtons to have a viable § 1983 action, "the Plaintiffs must allege facts sufficient to present a clearly established constitutional duty to discover the *latent* suicidal tendencies of the Deceased and/or to deprive the Deceased of the means of taking his own life." (App. 4a) (emphasis added). In a strained effort to portray this case as one of mere negligence, their memorandum then repeatedly denied that James Buffington had any serious medical needs or that he was at risk to commit suicide. (App. 7a, 9a). In rejecting this mischaracterization of the Complaint, District Judge Joseph C. Howard held that the Complaint did state a viable due process claim under § 1983 (App. 65a-68a), and that "plaintiff's Complaint, far from defendants' characterization as *latent* suicidal tendencies by Buffington, reveal that, if taken as true, the defendants had ample notice of Buffington's ability to take his own life." (App. 67a) (emphasis in original). Construing the allegations, the district court noted that "Buffington's suicidal tendencies were not latent; they were ubiquitous." (App. 68a).

The officers moved to reconsider the district court's ruling. The words "qualified immunity," however, appear nowhere in their motion for reconsideration. (App. 69a-70a). In fact, the officers persisted in their argument that the Complaint alleged negligence, not an action maintainable pursuant to § 1983. This argument was premised on the officers' continuing refusal to ac-

knowledge that the Buffingtons' Complaint alleged that Buffington was openly and acutely suicidal:

> The Defendants respectfully disagree that the Decedent, David (sic) Buffington's suicidal tendencies were obvious to the officers . . . . *He showed no inclination to take his own life between the time of his apprehension and the time he was placed in the holding cell.* Given these facts, it is submitted that none of the officers involved in arresting or processing the Decedent acted in any way to deprive him of Due Process Rights under the 14th Amendment. *There is no indication that Mr. Buffington was, in the least, overtly suicidal during any phase of his detention.*

(App. 69a-70a) (emphasis added). Significantly, the officers then conceded that a constitutional violation would have been stated if the officers had known that James Buffington was openly suicidal: *"Clearly, if the officers knew of Mr. Buffington's suicidal tendencies and had done nothing to secure medical attention, a claimed violation of his constitutional rights would have been stated."* (App. 70a) (emphasis added).

The motion for reconsideration was denied on July 11, 1988. Apx. 159. The officers did *not* seek an immediate appeal. It was not until October, 1988 that they attempted to appeal by way of a "Motion to Amend Interlocutory Order." However, this attempted appeal contained *no reference whatsoever* to a qualified immunity defense. (App. 71a-74a). The district court denied the motion. Approximately one week before trial, the officers noted a second appeal pursuant to 28 U.S.C. § 1291 and moved to stay the proceedings. Apx. 4; 220-24. The district court denied the request for a stay, finding that defendants had "never raised" the issue of qualified immunity. (App. 75a). Similarly, former Fourth Circuit Chief Judge Winter declined to stay the proceedings pending appeal. Judge Winter stated: "Because I am in agreement with the district court that the defense of

qualified immunity has not been raised, and for the further reason that I do not see how qualified immunity applies in this case, I concluded to deny the stay." (App. 76a).

Contrary to the pretrial position of the defense lawyers, the officer defendants (and other police witnesses not named as defendants) testified uniformly of their awareness that Buffington was *openly* suicidal and in imminent danger of self-destructive behavior. *E.g.*, Apx. 1341; 1375-77; 1405-07; 1414-15. In returning a verdict against Officers Gaigalas and Tucker the jury necessarily found that these officers were aware that Buffington was openly suicidal. *See* Instructions (App. 38a). As the Fourth Circuit correctly observed, the officers have not assigned error to the refusal by the district court to give their requested instruction on qualified immunity. Petition Appendix at 15a.

At the close of evidence at trial the officers moved for directed verdict. The motion did not invoke qualified immunity as a defense to the § 1983 claim.[10] The district court reserved ruling on the motion for directed verdict. As the Fourth Circuit observed:

> After the jury returned verdicts under § 1983 against some of the individual defendants, those defendants moved for j.n.o.v., asserting, *inter alia*, in the motion itself that they were entitled to qualified immunity. *In their supporting brief, however, they made no argument whatsoever on this point* . . . . As with the refusal to give the qualified immunity instruction, the appellants have not on appeal assigned error to

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[10] The motion for directed verdict did assert "good faith immunity" as to Chief Behan. (App. 31a-32a). It also asserted, "[a]s to the state law claims" (App. 34a), the public official immunity of the officers applicable to nonmalicious acts. (App. 35a). At no point in moving for directed verdict did Officers Gaigalas (App. 34a) or Tucker (App. 33a) invoke qualified immunity as a defense to the § 1983 claim.

> the denial of the motion for directed verdict or j.n.o.v.

Petition Appendix at p. 15a (emphasis added).

The Fourth Circuit properly concluded, for reasons stated, that the motion for j.n.o.v. was insufficient to preserve the issue of qualified immunity as a question on appeal. In addition, the Court of Appeals was correct for a more fundamental reason. Unlike *Rakovich v. Wade*, 850 F.2d 1180, 1204 (7th Cir. 1988), on which the Petition relies so heavily (Petition at pp. 14, 15), the officers here did *not* specifically assert qualified immunity in their motion for directed verdict. (App. 33a-34a). This failure distinguishes *Rakovich* and precludes appellate review of that defense.[11]

Rule 50(a), Fed. R. Civ. P., mandates that a "motion for a directed verdict shall state the specific grounds therefor." Failure to raise an issue in a motion for directed verdict will preclude its assertion in a motion for j.n.o.v. *Federal Savings & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 137 (4th Cir. 1987). As mentioned earlier, the failure to raise a question in a motion for directed verdict also waives appellate review of that question. *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1058 (4th Cir. 1976). As was explained recently:

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[11] After the initial mistrial, defendants filed a "Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict." (App. 20a-21a). The text of the motion failed to set forth any specific ground for relief. Instead, it purported to adopt wholesale all of the arguments advanced at the prior trial. Although the accompanying memorandum uses the words "qualified immunity," the argument actually advanced cannot be characterized as a bona fide qualified immunity defense. Defendants actually stated therein (consistent with plaintiffs' position) that: "[e]valuating the conduct of the officers as of March 19, 1987, it is plain that the standard of deliberate indifference to serious medical needs is a standard that was applicable as of that date." (App. 25a).

> If a party fails to specify an issue in its motion for a directed verdict, it may not subsequently challenge the jury's verdict on that issue, which is conclusive on that point. A specific reference to the issue in a motion for judgment n.o.v. does not cure a prior failure to include the issue in the motion for a directed verdict and, thus, does not preserve the issue for review.

Kinzenbaw v. Deere & Co., 741 F.2d 383, 387 (Fed. Cir. 1984) (citations omitted), *cert. denied*, 470 U.S. 1004 (1985).[12]

It is significant that prior to the appeal, the officers never asserted that an openly and obviously suicidal detainee has no constitutional right to be protected from committing suicide while in police custody. In fact, the officers conceded below that they owed a duty to protect openly suicidal detainees from committing suicide. They did *not* argue that they were unaware of a constitutional right "that had not yet been declared." On the contrary, they readily acknowledged their duty to constantly mon-

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[12] *See Dow Chemical Corp. v. Weevil-Cide Co., Inc.*, 897 F.2d 481, 486 (10th Cir. 1990) (only questions raised in prior motion for directed verdict may be pursued in motion for j.n.o.v.); *Heller v. Champion Int'l Corp.*, 891 F.2d 432, 436 (2d Cir. 1989) (because motion for j.n.o.v. is a renewal of motion for directed verdict, it cannot assert a new ground for relief); *Hilord Chemical Corp. v. Ricoh Electronic, Inc.*, 875 F.2d 32, 37-38 (2d Cir. 1989) (motion for j.n.o.v. could not assert ground not included in motion for directed verdict); *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 292 n.5 (5th Cir. 1989) (party cannot base motion for j.n.o.v. on grounds not included in motion for directed verdict); *E.E.O.C. v. State of Del. Dept. of Health & Social Services*, 865 F.2d 1408, 1414 n.9 (3rd Cir. 1989) (additional arguments for j.n.o.v. not raised in directed verdict motion cannot be considered); *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1455 n.2 (10th Cir. 1987) (grounds not raised in motion for directed verdict may not later be raised in motion for j.n.o.v.); *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030, 1035 (1st Cir. 1984) (party may not base its motion for j.n.o.v. on ground that was not argued in its motion for directed verdict).

itor known suicidal detainees. They asserted that "every police officer, summoned by Appellees to testify, *already knew* [that] suicidal persons should be kept under constant observation at all times and not isolated." (App. 57a) (emphasis added).

On appeal, however, the officers abruptly changed course. Although they finally acknowledged the overwhelming evidence that James Buffington was openly suicidal, they concocted an argument, raised for the first time on appeal, that there was no duty to protect even an openly suicidal person when that person "has come into the custody of state agents as a result of a request for emergency assistance by the family." (App. 54a).

Prior to the filing of the petition for certiorari, the officers have never argued that as of the date of James Buffington's suicide on March 19, 1987, the officers did not know that failing to safeguard an openly suicidal person would violate that person's constitutional rights. In fact, at trial, Officer Gaigalas re-affirmed his deposition testimony that, because of the extreme danger, it would be "almost criminal" to knowingly place an obviously suicidal subject into a cell under the circumstances of this case.[13] (Apx. 1410-11).

Because of the overwhelming evidence that the officers were aware that Buffington was suicidal, the appellants elected to reverse their field on appeal. In fact, on appeal, the lead issue (as framed by the officers) was pre-

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[13] Because no Baltimore County police officer has ever been disciplined for failing to safeguard openly suicidal detainees, Apx. 1641, Gaigalas obviously acted with impunity in placing Buffington in a cell. In fact, despite the inherent danger of such a rule, a Department S.O.P. actually required placing self-destructive detainees in an individual cell. (Apx. 1752). As reflected in the jury's verdict against Baltimore County and Chief Behan, the Police Department's exoneration of Gaigalas and Tucker, *e.g.*, Apx. 1532; 1976, condoned their deliberate indifference towards Buffington, and evidenced an unconstitutional policy and custom of failing to safeguard patently suicidal detainees.

mised on the fact that the officers had an obviously suicidal person in custody as a result of a request by the detainee's family to protect that person from suicide:

> 1. Is there a right which exists pursuant to the Fourteenth [sic] Federal Constitution which guarantees an individual, in the police custody as a result of a request for assistance from the family, protection by the State from suicide?

(App. 52a).[14] Their brief discarded the "latent suicide" theory:

> *Gaigalas' act was done with knowledge of decedent's condition.* (Apx. 1407-08). Despite the fact that Gaigalas knew of other similar occurrences and should have appreciated the consequences that might result (Apx. 1402-05), Gaigalas still placed the decedent into the cell.

(App. 57a) (emphasis added).

Thus, on appeal the officers abandoned the argument that Buffington was merely *latently* suicidal. Instead, the officers conceived of their entirely novel "*DeShaney*-family request/no arrest" argument, presented on appeal for the first time. In essence they argued that under *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), there was no duty to protect a person from suicide "when a person has come into the custody of state agents as a result of a request for emergency assistance

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[14] The officers began their own statement of facts as follows: "On March 19, 1987, at 4:30 in the morning, *James Buffington made manifest his intention to take his own life* (Apx. 1077)." Appellants' Br. at 5 (emphasis added). The officers' abandonment of the "latent suicide" theory is evident in their following summary of the facts: "Here, the record is clear that James Buffington came into the custody of Baltimore County police officers upon the receipt of a request for emergency assistance by James' brother and sister-in-law . . . . Police began to prepare the paperwork associated with the incident, including a petition for an emergency psychiatric evaluation at a local hospital. (Apx. 1124-1201)." (App. 54a).

by the family." (App. 53a). However, the officers *conceded* that "*[t]here is also a substantial corpus of law among federal circuit and district courts which have recognized the prisoner's or detainee's right to protection from suicide through the provision of medical care and treatment. See, e.g., Partridge v. Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1988)." (App. 54a) (emphasis added).

It is in this context that the officers now contend that their opening brief advanced a qualified immunity argument. This argument was presented in two sentences, followed by a one-sentence conclusion:

> Absent a constitutionally secured right, which in turn may give rise to a duty, the State officer may assert and prevail upon the doctrine of qualified immunity. The absence of such a right precludes "contouring" of the right and it becomes impossible to argue that the State officer should have known of something which did not exist. . . . Accordingly, this Court must reverse the judgment entered against Appellants Behan, Gaigalas, and Tucker.

(App. 56a) (citations omitted).

The Fourth Circuit was correct in concluding that, even if Gaigalas and Tucker preserved the defense of qualified immunity in the trial court, their brief failed to present that issue for appellate consideration:

> Part II of the appellants' brief mentions qualified immunity for the officer defendants, but hinges the argument wholly on the lack of a constitutional violation—it does not assert that these defendants were entitled to qualified immunity because their conduct did not violate clearly established constitutional law of which a reasonable officer would have known. . . . Even under a generous reading of this argument, it does no more than assert that these individual defendants were entitled to qualified immunity because, *on the merits*, there was no constitutional violation. . . .

Petition Appendix at p. 13a (emphasis in original).

In their Petition, the officers complain of the Fourth Circuit's "refusal to consider" the qualified immunity issue. Petition at p. 15. This criticism of the lower court is unjustified. It is settled as a matter of federal appellate procedure that an issue raised in an opening brief, but not supported by argument, is deemed abandoned. Rule 28(a)(4), Fed. R. App. P. *See, e.g., United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 110 S.Ct. 1814 (1990); *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Jungels v. Pierce*, 825 F.2d 1127, 1130 (7th Cir. 1987); *Tallahassee Mem. Regional Med. Center v. Bowen*, 815 F.2d 1435, 1446 n.16 (11th Cir. 1987), *cert. denied*, 485 U.S. 1020 (1988); *Morrison v. City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985).

The Fourth Circuit observed that "the Buffingtons justifiably interpreted the qualified immunity issue raised by these defendants as simply duplicative of the merits issue, and so addressed only the merits." Petition Appendix at 13a. In preparing their own brief, the Buffingtons were "entitled to rely on the content of an appellant's brief for the scope of the issues appealed." *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983). The Court of Appeals thus concluded:

> In sum, we do not think the appellants have properly preserved and raised in this court an issue of qualified immunity distinct from the question of whether a constitutional violation occurred. We decline to consider such an issue *sua sponte*.

Petition Appendix at 15a. Given the *additional* failure of the officers to properly raise and preserve this issue in the trial court, granting the petition for writ of certiorari at the behest of those officers would allow this case to be decided on a ground never presented before in any meaningful sense. As did the Fourth Circuit, the Court should not permit litigants to blow hot and cold on the issues which they present for adjudication.

An examination of the record in this case discloses an attempt to persuade the Court to decide the case on an issue raised for the first time in the officers' Fourth Circuit reply brief. Relying upon *Danese v. Asman*, 835 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990), the reply brief claimed that the holding of *Danese* "with regard to qualified immunity *is directly on point* and, if applied, requires dismissal of claims against the individual appellants." (App. 79a) (emphasis added). The reply brief's reliance on *Danese v. Asman* represented an attempt to inject the defense of qualified immunity into this case for the first time. Obviously, the Fourth Circuit was correct in holding that issues cannot be raised for the first time in a reply brief.

The officers' procedural error in this regard is matched by the equally erroneous description of the holding in *Danese v. Asman*. The officers' Petition asserts: "[i]n *Danese* the Sixth Circuit held that, as a matter of law, there is no due process right to be protected from suicide." Petition at p. 11. Unlike the instant case, *Danese* involved a situation involving a *latently* suicidal detainee. In *Danese* the circuit court noted that "the 'right' that is truly at issue here is the right of a detainee to be *screened* correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide." 875 F.2d 1244 (emphasis added). The *Danese* court stated that "[*i*]*t is one thing to ignore someone who has a serious injury and is asking for medical help*; it is another to be required to *screen* prisoners correctly to find out that they need help." (emphasis added). *Id.* In finding the defense of qualified immunity applicable the court in *Danese* concluded:

> The court below did not cite any cases showing that the officers had the constitutional *duty to determine if Danese was seriously inclined to commit suicide and then stop him. The story might be different if the police were certain that Danese would attempt suicide and just ignored it, or if Danese had*

> *told them he needed psychological help. If a prisoner asks for or needs medical care, it must be supplied.*

Id. at 1244 (emphasis added).

Reliance on *Gagne v. City of Galveston*, 805 F.2d 558 (5th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987), is also totally inappropriate. *Gagne* involved an arrest for public intoxication. The Fifth Circuit stated:

> In this case, which arose from a jail suicide on May 17, 1983, we hold that the arresting officer *was not under a clearly established constitutional duty to discover the prisoner's suicidal tendencies* or to deprive him of the means of killing himself.

805 F.2d at 559 (emphasis added). In rejecting a qualified immunity defense in *Lewis v. Parish of Terrebone*, 894 F.2d 142, 145-46 (5th Cir. 1990), the Fifth Circuit noted that "[t]he custodian in *Gagne* had no knowledge of suicidal tendencies harbored by the detainee," and held that a detainee with known suicidal tendencies requires protective action by custodial officers.[15]

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[15] Even the cases cited by the Petitioners uniformly hold that there is a constitutional duty to protect suicidal persons to the extent that officials are on notice of risk of harm. *See Greason v. Kemp*, 891 F.2d 829, 835-36 (11th Cir. 1990) ("where prison personnel directly responsible for inmate care have knowledge that an inmate has attempted, or even threatened suicide, their failure to take steps to prevent that inmate from committing suicide can amount to deliberate indifference"); *Dorman v. District of Columbia*, 888 F.2d 159, 163 (D.C. Cir. 1989) (municipality can be held liable in a detainee suicide case where there is knowledge of the harm); *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1473 (1990) (where police have notice that detainee was suicidal and were indifferent to his medical needs, claim for violation of due process rights is stated); *Freedman v. City of Allentown*, 853 F.2d 1111, 1115 (3d Cir. 1988) (when police officers actually know of suicidal tendencies of a prisoner and fail to take reasonable precautions, due process rights have been violated); *State Bank of St. Charles v. Camic*, 712 F.2d 1140 (7th Cir.), *cert. denied*, 464 U.S. 995 (1983) (where officials have actual knowledge that detainee is a suicide risk and do not take reason-

The instant case does not involve the question of whether the officers should have discovered whether James Buffington had a *latent* suicidal tendency. They received a 911 call for the specific purpose of preventing his imminent suicide. Thus assuming *arguendo* that the officers raised a qualified immunity defense and did not waive or otherwise abandon it, it is nevertheless clear that, on the merits, it should be rejected as frivolous.

CONCLUSION

For the foregoing reasons, the Buffingtons respectfully request that the Court deny the Petition.

Respectfully submitted,

WILLIAM F. GATELY
DANIEL W. WHITNEY *
SEMMES, BOWEN & SEMMES
250 West Pratt Street
Baltimore, Maryland 21201
(301) 539-5040
Counsel for Respondents

* Counsel of Record

February 12, 1991

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able precautions to guard against self-inflicted harm, due process claim is stated).

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, *et al.*,
Defendants.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

[Filed Jan. 20, 1988]

Baltimore County, Maryland, Chief Cornelius J. Behan, Sergeant Daniel Yuska, Corporal Joseph Gribbin, Officer L. S. Harvey, and Officer Donald Gaigalas, Defendants, by their undersigned counsel, move pursuant to Rule 12b of the Federal Rules of Civil Procedure to dismiss the within Complaint, or, in the alternative, move, pursuant to Rule 56, for summary judgment in their favor as a matter of law and, state as follows:

1. That the within Complaint fails to state a cause of action upon which the relief prayed can be granted.

2. That this Court does not have jurisdiction over the claims asserted in the Complaint.

3. That the Complaint fails to state causes of action upon which the relief prayed can be granted against these Defendants.

4. That as to the Defendant, Baltimore County, Maryland, a body corporate and politic of the State of Maryland, it is immune with respect to the cause or causes of action presented in the Complaint.

5. That the individual Defendants are immune with respect to the claims presented in the within Complaint.

6. That this Court has no jurisdiction over the pendant state law claims, which fail to state causes of action against these Defendants, as a matter of law.

7. That there is no dispute as to any material facts with which the claims presented in the Complaint are concerned, and therefore, these Defendants are entitled to summary judgment in their favor as a matter of law.

For the reasons stated, the Defendants respectfully request that this Honorable Court dismiss the within Complaint, or, in the alternative, that this Court enter summary judgment in their favor as a matter of law, assessing costs and expenses against the Plaintiffs as appropriate.

/s/ Arnold Jablon
ARNOLD JABLON
County Attorney

/s/ John A. Austin
JOHN A. AUSTIN
Associate County Attorney
Trial Bar No. 00776

/s/ James G. Beach, III
JAMES G. BEACH, III
Assistant County Attorney
Trial Bar No. 01196
Office of Law
2nd Floor, Court House
Towson, Maryland 21204
301/494-4420

Attorneys for the Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

Baltimore County, Maryland, et al., Defendants, by their undersigned counsel, submit the following Memorandum to assist the Court in its consideration of the issues presented by the Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed concurrently in these proceedings on behalf of these Defendants.

The Plaintiffs, as the parents and Personal Representative of the late James E. Buffington, have filed with this Court, a thirty-six page Complaint asserting claims under 42 U.S.C. Section 1983, in Counts I and II, on behalf of themselves and the Decedent, and pendant state law claims for wrongful death and survival in Counts III and IV, on behalf of themselves and the Decedent. Notwithstanding the sophistic verbiage in the seventy-eight paragraphs of the Complaint, the essence of the Plaintiffs' claims is a theory of negligence on the part of the Defendants. Essentially, the Plaintiffs' claims are to the effect that the Defendants, and specifically the individual police officers, negligently failed to prevent the Deceased, James E. Buffington, from hanging himself while confined in a precinct holding cell at the Wilkens Station, follow-

ing his arrest for the burglary of his parents' home. (*See* Paragraphs 30-34 of the Complaint). However, because the claims for negligence as framed by the four counts of the Complaint are barred by various immunities that are applicable to the Defendants, the Complaint should properly be dismissed at this time.

Claims Under 42 U.S.C. Section 1983

Plaintiffs have presented separate claims on behalf of the Decedent, James E. Buffington and on behalf of themselves as surviving parents pursuant to 42 U.S.C. Section 1983. Addressing these claims in reverse order, the Plaintiffs under Count II have alleged standing to bring a direct action under Section 1983 on behalf of themselves as the parents of the Deceased, James E. Buffington, and have alleged a deprivation of their constitutional rights to enjoy the association, companionship, and relationship with the Decedent. Otherwise stated, Count II is an effort to present a federal, wrongful death and survivor claim on behalf of the Plaintiffs as parents of the Deceased. Such claims are clearly not within the scope of Section 1983 and must be brought, if at all, pursuant to applicable state law tort theories. With respect to the claims presented under 42 U.S.C. Section 1983, a plaintiff must allege facts sufficient to establish a violation of some protected federal constitutional right of the plaintiff, clearly established the time of the occurrence, which is the subject of the Complaint. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Applying this rule to the case at bar, the Plaintiffs must allege facts sufficient to present a clearly established constitutional duty to discover the latent suicidal tendencies of the Deceased and/or to deprive the Deceased of the means of taking his own life. The existence of such a clearly defined constitutional duty was addressed squarely and rejected by the United States Court of Appeals for the Fifth Circuit in the leading case of *Gagne v. City of Galveston*, 805 F.2d 558

(5th Cir. 1986). In that case, the Court of Appeals for the Fifth Circuit dismissed claims factually and legally identical to the claims in the case at bar, using the following language:

> "The only factual allegations against Putnal (the arresting officer) that are remotely relevant to the claimed deprivation of constitutional rights are that Putnal failed to remove the decedent's belt and that the decedent was not placed under 'heightened surveillance' at the jail. The plaintiffs have not cited any case suggesting that a constitutional duty to protect prisoners from self-destructive behavior was clearly established at the time Gagne was arrested. Indeed, the case of *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986), shows that the possible existence and scope of such a duty has only very recently begun to attract attention in this circuit. Thus, under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), the claim against Putnal must be dismissed."

The claims in the *Gagne* case were brought by Gagne's estate and survivors under 42 U.S.C. Section 1983. Identical claims have been brought by the Plaintiffs as the surviving parents of James E. Buffington under Count II. A careful examination of the allegations of the Complaint clearly demonstrate that the within case is squarely within the holding of the Fifth Circuit in the *Gagne* case and therefore, Count II should properly be dismissed.

The well-pleaded facts presented in the Complaint filed in these proceedings recite that the Plaintiff's Decedent, James E. Buffington, was placed in a cell in the Wilkens Station and at some point in time between approximately 6:25 and 7:20 a.m., he committed suicide by hanging himself in a noose fashioned from his own pants. (*See* Paragraph 46). From the other allegations of the Complaint, it appears that prior to being placed in the cell

that the Decedent's belt, shoes, shoelaces, and other similar articles of clothing had been removed from him leaving him with only his shoes, socks, pants, shirt and undergarments. The Complaint also alleges that although the Decedent had left a suicide note and had previously displayed emotional instability that at the time of his apprehension, he advised the officers that he did not intend to end his life, even though he was at that time in the possession of several handguns and two rifles, and apparently a sufficient quantity of ammunition for all of these weapons. (*See* Paragraphs 35 and 36). Although it is alleged without specificity that the Decedent, James E. Buffington, had been drinking (Paragraph 36), there is no further allegation in the Complaint that the Decedent was intoxicated, there being only a statement that his judgment was impaired by alcohol. (*See* Paragraph 42). By contrast with the facts as alleged within Complaint, the Plaintiff in the *Gagne* case was arrested for public intoxication, was apparently extremely intoxicated, and was placed in a cell block without first removing his belt. This action violated the Departmental policies of the Police Department of the City of Galveston, and as a result, the belt was used as a noose by the Plaintiff, Gagne, to take his own life. Further, the Plaintiff, Gagne, apparently had scars on one wrist from a prior suicide attempt which was apparently known to the arresting officers.

By comparison with the case at bar, there are no allegations in the Complaint that the Decedent, James E. Buffington, had ever previously attempted suicide and the contents of the alleged suicide note are not made a part of the Complaint so as it is not possible to evaluate whether or not that note, in and of itself, would have been sufficient to put the officers on any additional notice regarding the suicidal tendencies of the Decedent. However, notwithstanding the contents of the note, the Complaint plainly alleges that the officers were in fact in the process of preparing the necessary paperwork for an emergency commitment of the Decedent prior to and at

the time he took his own life. (*See* Paragraph 37). It is plain that the Complaint alleges no need for the Decedent to have been continuously monitored as he had displayed no unusual actions after being taken into custody and indeed, the Complaint itself describes him as being "thoroughly docile and submissive" during the processing at Wilkens Station. (*See* Paragraph 38). In short, the Complaint clearly alleges facts that establish that there was no basis for the arresting officers to conclude that the Decedent present any unusual risk to himself. Thus, there are no facts alleged in the within Complaint that would remove this case from the holdings in the *Gagne* case, nor are there any additional factors present that would require a different result than that reached by the Court in *Gagne*. There being no factual basis upon which to conclude that the officers who handled Mr. Buffington were under a constitutional duty to prevent him from taking his own life, there can be no actionable violation of Section 1983 as a result of his suicide.

In apparent recognition of this factual and legal problem, the Plaintiffs have attempted to allege a deprivation of the constitutional rights of the Decedent by alleging a violation of his Sixth Amendment rights as a result of claimed deliberate indifference to his serious medical needs. The bald, unsubstantiated allegations of the Complaint attempt to bring this case within the case law standards regarding medical care of inmates. However, it is clear that the facts of the case at bar do not present an actual claim for deliberate indifference to serious medical needs.

The Plaintiffs' claims are asserted in a guise that would attempt to bring them within the confines of the case law principles established by the leading decision of the United States Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), which held that deliberate indifference to serious medical needs by institutional staff constituted cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. In *Estelle v. Gamble*,

supra, the Supreme Court, in analyzing a physician's diagnostic treatment of a confined inmate, held plainly that the standard to be applied, deliberate indifference, was to be distinguished from a mere negligence standard, and distinguished between a claim for deliberate indifference and a claim of medical malpractice. In making this distinction, the Court held:

> "A complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice cannot become a constitutional violation merely because the victim is a prisoner." 429 U.S. at 109.

This distinction between deliberate indifference and mere negligence has been carried forward by the more recent decisions of the Supreme Court in *Davidson v. Cannon*, 474 U.S. —— (1986) and *Daniels v. Williams*, 474 U.S. —— (1986), where the Supreme Court held that a claim for simple negligence or lack of due care does not state an actionable constitutional claim under 42 U.S.C. Section 1983. Specifically, the Supreme Court in *Davidson v. Cannon, supra*, held as follows:

> "Respondents' lack of due care in this case led to serious injury, but that lack of due care simply does not approach the sort of abusive government conduct that the due process clause was designed to prevent. *Daniels*, slip opinion, at page 4-6. Far from abusing governmental power, or employing it as an instrument of oppression, Respondents mistakenly believe that the situation was not particularly serious and Respondent James simply forgot about the note. The guarantee of due process has never been understood to mean that the statements guarantee due care on the part of its officials."

The inescapable thrust of these holdings by the United States Supreme Court is that negligent conduct on the

part of a public official cannot form the basis for a claim under Section 1983. This is true whether the claim is presented under the Eighth Amendment with respect to a confined inmate or under the Fourteenth Amendment with respect to a pretrial detainee, such as the Plaintiff's Decedent. The Complaint in the within proceedings, although repeatedly phrasing "deliberate indifference", is lacking in factual substantiation that would give rise to such claims. Indeed, certain of the paragraphs of the Complaint clearly state that the cause of action is for negligent conduct on the part of the Defendants. *See*, for example, Paragraphs 49, 68, 71, and 76, all of which speak in terms of the Defendants' negligently failing to fulfill an alleged duty to the Decedent. The bald, unsubstantiated allegations of deliberate indifference notwithstanding, the factual circumstances that led up to the death of the Decedent as described in the Complaint, clearly indicate that there was no indication that the Plaintiff had any serious medical needs or that he was at risk to take his own life. Indeed, notwithstanding the ingestion of alcohol, the Complaint describes the Plaintiff Decedent as being "thoroughly docile and submissive."

Taking the allegations of Counts I and II and of the Complaint as a whole in a light most favorable to the Plaintiffs' cause, the only claims that is presented is that the Defendants negligently failed in their attempt to prevent the Plaintiffs' Decedent from committing suicide by failing to secure for him psychiatric care in time to prevent him from taking his own life. However, these claims likewise fail to state a cause of action. In the leading decision of *Jackson v. City of Jolliet*, 715 F.2d 100 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984), claims presented under Section 1983, were dismissed for failure to state a claim in the following language:

> "We hold that an attempt by state officers to assist at an accident is not a deprivation of life without due process of law under the Fourteenth Amendment

> when the attempt fails because of the negligence, or even gross negligence of the officers or their supervisors, and the accident victim dies." 715 F.2d 1200, at 1206.

The Court in *Jackson v. City of Jolliet, supra,* dismissed claims presented through the Fourteenth Amendment for negligent action of the governmental officials in effecting a rescue attempt. A Petition for Certiorari was filed with the Supreme Court and was denied. However, the application of the principles of *Jackson* to the case at bar is clear. An attempt by state officers to prevent a suicidal subject from taking his own life is not actionable under Section 1983 through the Fourteenth Amendment when the efforts of the officers fail because of their negligence or even gross negligence, and the suicidal subject, through determined effort, succeeds in taking his own life. It is respectfully submitted that a straightforward application of the applicable principles of law demonstrate that state officers such as the Defendants cannot be liable for negligent acts or omissions committed in the scope of their official duties. This is particularly true when the moving force behind the alleged constitutional deprivation is the Deceased himself. It is for these reasons as well as others noted herein that Counts I and II should now properly be dismissed as against all Defendants.

* * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MOTION TO DISMISS THE AMENDED COMPLAINT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

[Filed Sept. 8, 1988]

Baltimore County, Maryland, et al., Defendants, by the undersigned attorneys, move pursuant to Rule 12b of the Federal Rules of Civil Procedure to dismiss the Amended Complaint filed herein, or, in the alternative, move, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in their favor as a matter of law and as grounds therefore state as follows:

1. That the Amended Complaint fails to state a cause of action against the named Defendants.

2. The Amended Complaint fails to state a cause of action, either under 42 U.S.C. Section 1983 or under the pendant State law claims presented in the various numbered counts of the Amended Complaint.

3. That as to the individual Defendants who are sued individually, no claims are stated in the Amended Complaint for any wrongful acts committed by them solely

in their individual capacities, as opposed to their official capacities, and therefore, the Amended Complaint should be dismissed against all Defendants in their individual capacities.

4. That as to each of the individual Defendants, public official immunity bars any State law claims presented in the Amended Complaint.

5. That as to the claims presented under 42 U.S.C. Section 1983, all of the individual Defendants have immunity with respect to the claims enumerated in the Amended Complaint.

6. That as to the Defendant, Baltimore County, Maryland, the Amended Complaint fails to state a cause of action against this Defendant as a body corporate and politic of the State of Maryland.

7. That to the extent that the several counts of the Amended Complaint purport to allege a cause of action for wrongful death and survivorship under 42 U.S.C. Section 1983, these claims should be dismissed as a matter of law.

8. That the pendant State law claims against the Defendant, Baltimore County, Maryland, are barred by the doctrine of governmental immunity.

9. That as to the individual Defendants there is no dispute as to any material fact with respect to their liability to the Plaintiffs and therefore, summary judgment is appropriate in their favor as a matter of law. The materials which set forth the undisputed material facts are attached hereto and incorporated by reference and are identified in the accompanying Memorandum of Points and Authorities.

10. That the claims for non-economic damages against all of the Defendants should be dismissed to the extent that these claims exceed the maximum of limit of Three Hundred Fifty Thousand Dollars ($350,000.00) established

by Section 11-108 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland.

11. That as to the claims presented for the first time in the Amended Complaint, that there was a constitutional violation as a result of the alleged inadequate or incomplete investigation that was conducted following the events described in the Amended Complaint, there is no constitutional right to have such an investigation conducted and thus, to the extent that these allegations purport to present claims under 42 U.S.C. Section 1983, these claims should now properly be dismissed.

12. The Amended Complaint should be stricken as it was filed without first securing leave of Court or consent of opposing parties as required by Rule 15(a) of the Federal Rules of Civil Procedure.

For the reasons stated, the Defendants respectfully request this Honorable Court pass an Order dismissing the Amended Complaint, or, in the alternative, entering summary judgment in favor of the Defendants as a matter of law, assessing costs against the Plaintiffs as appropriate.

/s/ Arnold Jablon
ARNOLD JABLON
County Attorney

/s/ James G. Beach III
JAMES G. BEACH, III
Assistant County Attorney

/s/ John A. Austin
JOHN A. AUSTIN
Assistant County Attorney
Trial Bar No. 00776
Baltimore County Office of Law
2nd Floor, Old Courthouse
Towson, Maryland 21204
301/494-4420

Attorneys for Defendant,
Baltimore County, Maryland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

Baltimore County, Maryland, et al., Defendants, by their undersigned attorneys, submit the following Memorandum to assist the Court in its consideration of the issues presented by the Motion to Dismiss the Amended Complaint, or in the Alternative, Motion for Summary Judgment filed concurrently in these proceedings on behalf of these Defendants.

* * * *

Counts I and II of the Amended Complaint assert claims respectively on behalf of the estate of the Decedent for a deprivation of constitutional rights under 42 U.S.C. Section 1983, in Count I, and in Count II, claims under Section 1983 on behalf of the Plaintiffs as the surviving parents of the Decedent. As to Count II, the Amended Complaint fails to state a cause of action under Section 1983, for it fails to identify a recognized federally protected constitutional right that has been violated or denied to them as a result of their son's suicide. Specifically, in Paragraph 67 of the Amended Complaint, the Plaintiffs' attempt to allege a liberty interest in the continued relationship with their son, as well as a liberty interest in

the expectation of certain minimal standards of treatment for their son. Otherwise stated, the claims in Count II are not recognizable before this Court as a claim under Section 1983 for the alleged liberty interest identified in Count II simply does not exist as a matter of law. At no point in the Amended Complaint are there any allegations tending to establish the existence of some federally protected liberty interest flowing solely to the parents independent of their claims under Count I on behalf of their deceased son. Count II is plainly an effort to present a federal wrongful death and survivor claim on behalf of the Plaintiffs as the parents of the deceased, which claims are a duplication of the wrongful death and survivor claims presented in Counts III and IV under State law tort theories. However, the Plaintiffs have failed to allege facts or to recite case law precedent establishing a protected Fourteenth Amendment liberty interest as alleged in Count II. Indeed, the leading cases are to the contrary. *See Elliott v. Perez*, 751 F.2d 1472 (5th Cir., 1985) ; *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ; *Gagne v. City of Galveston*, 805 F.2d 558 (5th Cir., 1986). The claims presented by the Plaintiffs under Count II plainly do not exist as a matter of law, and therefore, Count II should properly be dismissed.

With respect to Count I, which alleges direct claims on behalf of the Decedent's estate under Section 1983, it is to be noted that all of the individual Defendants are sued in their official capacities as members of the Baltimore County Police Department. In substance, the claims presented in Count I allege that the individual Defendants were either negligent in their handling of, or deliberately indifferent to, the medical needs of the Plaintiff's Decedent with respect to his needs for psychiatric treatment as demonstrated through his overtly suicidal behavior. The Amended Complaint further alleges that the negligent or deliberately indifferent activities were the result of inadequate training and supervision by the Defendants Kramer and Behan, were the product of the

alleged inadequacies of the lockup facilities themselves, or were the product of the alleged inadequacies in the Departmental Rules and Regulations. All of these factors the Amended Complaint alleges proximately caused the suicide of James Buffington by resulting in his being placed by himself in the cell where he ultimately committed suicide.

Focusing for the moment only upon the individual police officer Defendants, it is beyond dispute that none of these individual officers are alleged to nor could have had any responsibility for the implementation of policies, rules or regulations for the implementation of adequate training programs, nor for the building of the lockup facilities. Therefore, the liability of the individual Defendants Yuska, Gribbin, Harvey, Gaigalas, Tucker, and Maeser turns upon the question of whether they were negligent or deliberately indifferent with respect to securing necessary medical care for the Decedent Plaintiff. To impose liability upon these individual officers, the Plaintiffs must prove that their actions imposed punishment upon the deceased during the period of his confinement, as well as upon factors relating to whether those officers with actual knowledge of the decedent's suicidal tendencies failed to take any action to protect him from himself. Further, the conduct of the individual officers must have been deliberate, and not merely negligent, for negligence has been conclusively determined by the Supreme Court of the United States to be an insufficient basis for an actionable claim under 42 U.S.C. Section 1983. At a minimum, therefore, the claims against the individual police officers for negligent conduct should properly be dismissed. As the Supreme Court in *Davidson v. Cannon*, 474 U.S. 344 (1986) held:

> "Respondent's lack of due care in this case led to serious injury, but that lack of due care simply does not approach the sort of abusive government conduct that the due process clause was designed to

> prevent . . . the guarantee of due process has never been understood to mean that the state must guarantee due process on the part of its officials."

The inescapable thrust of this plain ruling by the United States Supreme Court is that negligent conduct on the part of the individual police officers cannot form the basis for claims under Section 1983, whether those claims are presented under the Eighth Amendment or under the Fourteenth Amendment.

Of the individual police officer Defendants, only Officer Harvey and Corporal Gribbin had full knowledge of the particulars of the events of the evening in question. Both of these officers had read the suicide note, had spoken with the Decedent's relatives and had been involved in making the decision that he should be taken for an emergency evaluation. However, neither of these officers had any role in the decision to put the Decedent in the cell where he ultimatly took his life. It is undisputed that it was this action that afforded the Decedent the opportunity to commit suicide. It is likewise undisputed that Officer Gaigalas is the officer who placed the Decedent in the cell where he committed suicide and that Officer Gaigalas at that time had no knowledge of the Decedent's suicidal tendencies. (*See* Exhibit "A", portions of the Deposition Transcript of Officer Gaigalas, copies of which are attached hereto and incorporated herewith by reference). Officer Gaigalas has plainly stated, without contradiction, that had he known of the Decedent's suicidal tendencies, he would have never placed him in a cell where he could have committed suicide. It is also beyond dispute that Officer Gaigalas came on duty at approximately 6:15 a.m., at which time Mr. Buffington had already been arrested and was chained to a bar near the desk area. Absent some proof of actual knowledge on the part of Officer Gaigalas, there can be no liability against him for his actions with respect to the Decedent, which were, at worst, merely negligent.

Similarly, with respect to Officer Maeser, this officer was no longer on duty or even in the station house at the time Officer Gaigalas put Mr. Buffington into the holding cell. Officer Maeser's alleged wrongful conduct is framed in Paragraphs 21 and 46 to 51 of the Amended Complaint. All of these paragraphs, however, make specific reference to a period of time, beginning at approximately 6:25 a.m. when Officer Maeser was no longer in the station house. (See Deposition transcript pages — Exhibit "B" attached). Further, Officer Maeser is alleged to have violated certain duties owed to the Decedent, which duties would only arise if he were physically present and thereby in some way in control of the ultimate disposition of the Decedent. Further, to the extent that the Amended Complaint alleges a breach of these alleged duties on the part of Officer Maeser, these allegations allege merely negligent conduct on his part. Because this negligent conduct is not actionable, *Davidson v. Cannon, supra*, the Amended Complaint should be dismissed as against Officer Maeser.

Officer Ronald Tucker was the desk officer who relieved Officer Maeser and Officer Kamberger (Officer Kamberger is not joined as a Defendant in these proceedings), and he arrived on duty ahead of Officer Gaigalas. In his Deposition testimony, (*See* Exhibit "C", portions of the Deposition Transcript of Officer Tucker, copies of which are attached hereto and incorporated herewith by reference), Officer Tucker has stated that he became aware of the Decedent's suicidal tendencies, although he had not read the suicide note nor had much opportunity to observe the Decedent. The alleged wrongful conduct of Officer Tucker is framed in the same paragraphs as those addressing Officers Harvey, Gaigalas, Maeser, Sergeant Yuska, and Corporal Gribbin. However, at worst, the alleged wrongful conduct of Officer Tucker, as it related to his handling of the Decedent, was mere negligence and thus not actionable under Section 1983.

Sergeant Yuska was the oncoming shift supervisor at Wilkens Station on the morning in question and was the immediate supervisor of the other Defendants. Sergeant Yuska, in his Deposition testimony (*See* Exhibit "D", portions of the Deposition Transcript of Sergeant Yuska, copies of which are attached hereto and incorporated herewith by reference), has repeatedly stated that he had no knowledge of the Decedent's suicidal tendencies. Sergant Yuska has also plainly stated that he did not direct the desk officers to take any particular action with respect to the Decedent other than to state that here was a standing order on his part that suicidal subjects were not to be placed in the lockup. Further, Sergeant Yuska has likewise testified, without contradiction, that he was involved in a great many other routine duties during the period of time in which the Decedent was placed in the cell. Sergeant Yuska, therefore, had no knowledge of the Decedent's suicidal tendencies nor did he have any input with respect to place Mr. Buffington in a holding cell. Otherwise stated, there are no allegations, supported by competent evidence, that Sergeant Yuska was involved in any wrongful actions, negligent or otherwise, that directly and proximately caused the death of Mr. Buffington.

* * * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

[Filed Dec. 2, 1988]

Baltimore County, Maryland, et al., by their undersigned attorneys, moves this Honorable Court pursuant to Rule 50 of the Federal Rules of Civil Procedure for a directed verdict in favor of the Defendants as a matter of law, or, in the alternative, for a Judgment notwithstanding the verdict in favor of all of the Defendants and as grounds therefore state as follows:

1. That the within proceedings were tried before a jury, which trial ended on or about November 23, 1988 in a mistrial.

2. Prior to the case being submitted to the Jury, all of the Defendants made a motion for a directed verdict at the close of all of the evidence asking that the Court enter Judgment in their favor as a matter of law. At that time, the Court reserved its rulings on the Motions that were made, and no further ruling has been made on

said Motions subsequent to the conclusion of the trial as aforesaid.

3. Pursuant to the provisions of Rule 50 of the Federal Rules of Civil Procedure, the Defendants are now entitled to have the rulings previously reserved by this Court reviewed and adjudicated prior to a retrial of these proceedings.

4. The Defendants incorporate by reference the previous arguments presented at the time of trial in connection with the Motion for a Directed Verdict made at the close of all of the evidence. In addition, the Defendants incorporate herewith by reference the enclosed Memorandum of Points and Authorites submited in support of this Motion.

For the reasons stated, the Defendants respectfully request this Honorable Court grant directed verdicts in favor of all of the Defendants as a matter of law and that Judgments be entered in favor of the Defendants accordingly.

/s/ Arnold Jablon
ARNOLD JABLON
County Attorney

/s/ James G. Beach, III
JAMES G. BEACH, III
Assistant County Attorney

/s/ John A. Austin
JOHN A. AUSTIN
Assistant County Attorney
Trial Bar No. 00776
Baltimore County Office of Law
2nd Floor, Old Courthouse
Towson, Maryland 21204
301/887-4420

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

[Filed Dec. 2, 1988]

* * * *

IV. *Individual Defendants—Federal Claims*

The claims against the individual Defendants are founded in negligence theories asserting claims under Section 1983. However, since the claims are merely for negligence, it is plain that these claims are not actionable. *See Daniels v. Williams*, 106 S.Ct. 662 (1986) and *Davidson v. Cannon*, 106 S.Ct. 668 (1986). Further, the evidence at trial in these proceedings fail to demonstrate more than mere negligence. At best, the testimony generated proof only of errors of judgments or an inadvertent failure to take appropriate action. Such conduct does not amount to "deliberate indifference." *See Boyce v. Aelizaduh*, 595 F.2d 948 (4th Cir., 1979). As the United States Court of Appeals for the Fifth Circuit held in defining deliberate indifference in *Johnson v. Treen*, 759 F.2d 1236 (5th Cir., 1985) :

> "The facts underlying a claim of 'deliberate indifference' must *clearly evince* the medical need in question and the alleged official dereliction. *Woodall v. Foti*, 648 F.2d 268 (5th Cir., 1981). The legal conclusion of 'deliberate indifference', therefore, must rest on facts clearly evincing 'wanton' actions on the part of the defendants." (Emphasis in original). 759 F.2d at 1238.

No proof was presented at trial evidencing that any of the conduct of any of the Defendants begins to approach the standard of recklessness or wanton conduct that is the basis of deliberate indifference. Further, as to the individual Defendants Behan and Kramer, the case can proceed against them only if they were deliberately indifferent in their respective roles as supervisors. As to Chief Behan, the record before this Court is totally devoid of any evidence that he was deliberately indifferent in connection with establishing appropriate training programs, in upgrading precinct lockups, and in continuing to establish and monitor Departmental Rules and Regulations relating to suicidal detainees. However, the failure to implement every conceivable device or practice or to implement every conceivable program of training to prevent suicides does not amount to the wanton conduct that is the standard for deliberate indifference. *See* for example, *Roberts v. City of Troy*, 773 F.2d 720 (6th Cir., 1985) (budget constraints and limited resources in personnel that resulted in failure to provide suicide prevention training does not amount to deliberate indifference). Moreover, there is no clearly established legal principle within this Circuit requiring that all possible precautions be taken in order to avoid liability under 42 U.S.C. Section 1983. The same is true with respect to Captain Kramer. Indeed, Captain Kramer was the Commander of the Wilkens Precinct for slightly over six (6) months prior to March 19, 1987. This period of time is plainly inadequate for Captain Kramer to have implemented the

kinds of suicide training postulated by the expert witnesses who testified on behalf of the Plaintiffs. Because there is no *respondeat superior* liability on behalf of either Chief Behan or Captain Kramer, and because there is no evidence that their conduct as supervisors was deliberately indifferent, the Federal claims should now properly be dismissed.

With respect to the individual officers, it is plain that Officer Maeser cannot be held deliberately indifferent regarding the handling of Mr. Buffington for he was no longer present when Mr. Buffington was placed in a detention cell. Likewise, with respect to Officer Harvey, Sergeant Gribbin, and Sergeant Yuska, none of these individuals was responsible for either commanding, directing or suggesting that James Buffington be placed in a detention cell. Not only is there no evidence of deliberate indifference on behalf of these four (4) officers, but there is likewise no causal connection between any of their conduct and the placing of Mr. Buffington in a detention cell. With respect to Officer Tucker, he likewise had no input into the decision to place Mr. Buffington into a detention cell, and there is no other evidence that he was otherwise deliberately indifferent to Mr. Buffington's serious medical needs. As to Officer Gaigalas, at best, the evidence adduced against him demonstrates merely errors in judgment or an inadvertent failure to take appropriate action. For these reasons, the Federal claims against the individual officers should be dismissed.

Each of the individual Defendants possesses a qualified immunity from liability under Section 1983, so long as their conduct is reasonable in light of legal rules and principles that were clearly established at the time of the actions in question. As the United States Court of Appeals for the Fourth Circuit held in the case of *Osabutey v. Welsh*, —— F.2d ——, No. 87-1757 (decided September 16, 1988):

> "The standard to be applied here is one of the 'objective legal reasonableness' of official conduct, 'assessed in light of the legal rules that were 'clearly established' at the time it was taken. *Anderson v. Creighton*, —— U.S. —— (1987), 55 U.S.L.W. 5092, 5093. It is the right that is alleged to have been violated that must be 'clearly established.' It must be sufficiently so '. . . that in light of preexisting law the unlawfulness must be apparent.' 55 U.S.L.W. at 5093."

Evaluating the conduct of the officers as of March 19, 1987, it is plain that the standard of deliberate indifference to serious medical needs is a standard that was applicable as of that date. Other cases establishing a different standard such as *Spell v. McDaniel*, *supra*, and *Cooper v. Dyke*, 814 F.2d 941 (4th Cir., 1987) were decided after March 19, 1987, the date of Mr. Buffington's death. Because police officers are not required to anticipate the future course of case law decisions and are only required to conform their conduct to clearly establish law, it is plain that the standard of deliberate indifference is the only standard that is properly applicable as a basis for evaluating the conduct of the officers with regard to the Federal claims presented in this litigation. A straightforward application of the requirement of deliberate indifference plainly requires a dismissal of the Federal claims against each of the individual Defendants.

For the reasons stated herein, the Defendants respectfully request this Honorable Court to rule upon the Motions for Directed Verdict and that these Motions be granted entering Judgments in favor of these Defendants as a matter of law.

* * * *

APPENDIX D

[973]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
VOLUME 9

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of JAMES E. BUFFINGTON, Deceased and DAVID M. BUFFINGTON, Individually

-v-

BALTIMORE COUNTY, MARYLAND,
CORNELIUS J. BEHAN, *et al.*

The above-entitled matter continued on trial before the Honorable Joseph C. Howard, and a jury, commencing at 10.00 a.m. on January 12th, 1989, at Baltimore, Maryland.

APPEARANCES

On behalf of the Plaintiffs:
William F. Gately, Esquire
Daniel W. Whitney, Esquire

On behalf of the Defendants:
John A. Austin, Esquire
James G. Beach, III, Esquire

* * * *

[1032] THE COURT: Let the record show that the plaintiff has rested their case.

Are there any motions?

MR. AUSTIN: Yes, Your Honor, thank you. At this time on behalf of each and every one of the defendants we would move for judgments in their favor, and we would initially, of course, move for judgments in favor of all of the individual defendants in their personal capacities, there being no testimony whatever that they acted other than in their official capacity as police officers.

Secondly, we would at this time submit for Your Honor's further consideration the points made in the motion for judgments NOV that is currently before the Court and has been reserved as well as the points and authorities and arguments prepared in the memorandum that accompanied that motion.

In addition, Your Honor, I would also like to make the following points in support of the motion. The first point is with respect to the civil rights claim under Section 1983. The [1033] standard must be proof of deliberate indifference of the various individual defendants involved, including Chief Behan, and deliberate indifference is synonymous with wanton neglect, with willful misconduct in regard to the serious medical needs of persons such as Mr. Buffington.

None of the expert witnesses in this case have identified any actions on the part of these officers that violate that standard. The expert witnesses talked about a lot of things, ACA standards, AMA standards, numbers of written commentaries, but none of them flatly stated that what the officers did was deliberately indifferent or in violation of any of the case law standards that have been handed down with respect to handling suicidal detainees. All they said was they did not follow some of these guidelines, some of which are merely suggestions for action, but in no place did I hear any of the expert witnesses say this conduct amounted to deliberate indifference or was even negligent.

But again, if the conduct was to be considered only merely negligence, that is not deliberate indifference and that did not give rise to any claims under Section 1983.

Further, with respect to Chief Behan, he must be considered to be indifferent in the manner in which he administers the department. The evidence does not show that. The only dispute can be is whether or not he may have done things differently or better, but it is clear he was doing some [1034] things, and to have deliberate indifference you must really have almost total inaction or action that is of little consequence, and there has been no testimony that what Chief Behan did was of no consequence or made little difference with respect to running the department, but rather only these experts had a difference of opinion as to whether or not he was doing enough; and that's not enough to go to the jury on the civil rights claim.

As to the negligence counts, under the state law claims, again we would reassert governmental immunity and public official immunity on behalf of these officers in Balitmore County. Again, if what has been proven is negligence they are immune. With respect to good faith immunity, I think it's clear that all of the officers have this and that the evidence indicated, to this point has indicated that they all acted in good faith with respect to trying to discharge their responsibilities in this regard.

With respect to Chief Behan, it's clear from his testimony or the testimony that the defendant elicited from him through deposition that he acted in good faith with respect to trying to administer to the defendant properly, and in trying to observe all the legal guidelines. I believe his deposition testimony was on point. He attempted to have the department monitor and observe all current trends in the law in that regard. I believe the evidence at this point, is that there is [1035] no dispute at this point as to his good faith administration of the department which removes him from liability under Section 1983.

Other than that, Your Honor, we would rest on the points made in our memorandum. Thank you.

* * * *

APPENDIX E

[973]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
VOLUME 9

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of JAMES E. BUFFINGTON, Deceased and DAVID M. BUFFINGTON, Individually

-v-

BALTIMORE COUNTY, MARYLAND,
CORNELIUS J. BEHAN, *et al.*

The above-entitled matter continued on trial before the Honorable Joseph C. Howard, and a jury, commencing at 10:00 a.m. on January 12th, 1989, at Baltimore, Maryland.

APPEARANCES

On behalf of the Plaintiffs:

William F. Gately, Esquire
Daniel W. Whitney, Esquire

On behalf of the Defendants:

John A. Austin, Esquire
James G. Beach, III, Esquire

* * * *

[1153] MR. GATELY: Motions, Your Honor?

THE COURT: All right.

MR. AUSTIN: What's your pleasure on motions? Can we argue them now or tomorrow morning.

THE COURT: What's your pleasure? I will be here tomorrow morning.

MR. AUSTIN: We just have to put it on the record and we can do either today or tomorrow.

THE COURT: We can get it down while you're talking about it.

MR. AUSTIN: Fine, thank you.

Your Honor, at this time I would move for judgment in favor of each and every one of the defendants and as to each and every one of the claims, and I would like to briefly summarize the arguments that I made previously and the arguments that we made in our motion for directed verdict and for motion notwithstanding the verdict, which motions Your Honor has currently reserved on at this time.

Your Honor, with respect to the federal claims, and I'll start with the federal claims, as against Baltimore County, Maryland, there must be a custom, policy, practice or usage causing the constitutional deprivation that must be proven. Again, the only custom, practice and usage that has [1154] been zeroed in on in this case has to do with policies, rules, regulations and training.

Now, in order for that training to be the proximate cause of the constitutional deprivation, the training must be so inadequate as to amount to no training at all. That is, there must be a policy of inadequate training, and inadequate training in the sense that the training is superficial or it's minimal, and I think there has been the evidence before the Court at this point on the situation of training is that while there may be disagreement among the expert witnesses as to what training is required or whether or not the department was doing enough. I think the testimony you have from the chief and

from Officer Hann is that a great deal of training is going on, perhaps not to the satisfaction of everyone but certainly training that has been approved by people knowledgeable in the field and it's given to all officers and is repeated.

And with respect to Baltimore County doing training, that is more than minimal. I think we clearly have a policy that this training has been furnished, the training is constitutionally adequate, and there is really no dispute for the jury to resolve with respect to whether or not it might have been better. It is above the constitutional threshold and therefore whether or not it might have been better is simply not an issue for the jury to resolve.

With respect to rules and regulations, the same thing [1155] is true, and again with respect to that you've heard a great deal of testimony about the CALEA standards and how they apply and cover this whole area.

In summary, Your Honor, as to Baltimore County, Maryland, there is no proof of a policy or custom or practice or usage that would bring them in under Section 1983, and we would ask for—again they are, except for proof of those elements, Baltimore County as a municipality has no liability.

As to the individual officers, I'll start with Chief Behan. Again, as to Chief Behan it must be shown that he was totally indifferent in his management of the department and in those areas that could have proximally caused the constitutional deprivation, and those areas would have to be training and supervision of the officers or rules and regulations. We have his testimony, which we believe there is no dispute from the other evidence in the case, that indicates that he was not deliberately indifferent, deliberately indifferent in the sense of being—again I'll quote from some of the cases. There must be wanton action, that is action indifferent or to be of so little consequence as to amount to no action at all; that is action in the face of a persistent need that simply does not address that need in any way. And we do not have the evidence of that with respect to Chief Behan.

Again, he also has good faith immunity as a public official. He acts in good faith to bring his conduct in [1156] compliance with accepted standards, and he is entitled to that good faith immunity. Again, his testimony was extensive as to what he has done to try to bring the department and the operations for which he is responsible into compliance with constitutional tandards.

Again, good faith applies in two ways: One, either you don't know of a constitutional requirement or act in good faith with respect to trying to otherwise conform to it, or you know of a constitutional requirement and make good faith efforts to bring your conduct in compliance with it. It is the second part that applies to Chief Behan. He was aware of what was required and he took actions in good faith to address those problems, and we don't feel there is a jury issue on that point either. And his testimony as to what he has done over the years is not really controverted by any of the other evidence.

As to the individual officers, with respect to Captain Kramer, there is no finding of superior liability on his part. As a commander there is no indication he did anything else that would subject him to liability under Section 1983. Particularly with respect to training, there was no specific responsibility for it on his part to do the training. The training was done by other people; therefore, he could not have been significantly indifferent with respect to the training programs.

There is no other indication that he was significantly [1157] indifferent. He of course was not present, had no part in it, and there is simply no evidence that would tie him in to the basic constitutional claims that the suicide death of Mr. Buffington was proximally caused by deliberate indifference to serious medical needs by any actions of Captain Kramer.

With respect to the other individual officers, I start with Officer Maeser. Again, Mr. Kirkland testified that Officer Maeser's conduct would be entirely correct if he

communicated the information on Mr. Buffington to the other officers. Officer Maeser testified exactly that. His testimony was supported by the other officers. Again, Officer Maeser was not there when Mr. Buffington was placed in the cell. There simply is no evidence to indicate that he, one, had knowledge of the serious medical needs or, two, was in a position to be significantly indifferent to it, having been relieved at the point in time in which action was required to have been taken.

Again, deliberate indifference contemplates either taking no action or taking perhaps inappropriate or inadequate or insufficient action in response to a serious medical need. That contemplates not only knowledge of that action but an opportunity to do something, and if Officer Maeser was no longer there, he no longer had an opportunity to do anything. He could not be deliberately indifferent.

Certainly with respect to Sergeant Yuska, again, a [1158] person would have to know and have an opportunity to act on the circumstances. Sergeant Yuska had an opportunity to act but he had no knowledge of the particulars of the suicide and again could not be deliberately indifferent for not acting upon that which he did not know.

With respect to Officer Tucker, the same situation. He was at the desk and was in a position to act, had some limited knowledge, but again relied upon what Officer Gaigalas did and was entitled to rely upon that.

With respect to Officer Harvey, he had knowledge but was not in a position to act as he was not aware where the prisoner was at the time the decision was made to put him in the lockup.

The same is true with Sergeant Gribbin. He had knowledge but did not have the opportunity or control over the prisoner at the time. As to both of these officers, they had in fact acted in good faith with respect to setting in motion the necessary events to secure that medical attention for him. They had begun an emer-

gency evaluation and they were seeing to it. Again, that therefore brings in their good faith immunity. They knew what the standard was, they were acting in furtherance of that in an effort to secure the necessary medical need, medical needs, and secure attention to the medical needs, and unfortunately the prisoner committed suicide before that could be realized.

[1159] Again with respect to Officer Gaigalas, he testified that he knew of the emergency evaluation but not that the gentleman was suicidal. There is a lack of knowledge in his circumstances, and again there are testimony at best generally not deliberate indifference but only proof of errors in judgment or inadvertence and at best negligence, and negligence has never amounted to deliberate indifference. In fact, the Supreme Court held that negligence is not actionable under Section 1983; and again the leading cases on that are Daniels vs. Williams Davidson versus Cannon. Again, in one of those cases a correctional officer was sued because he had not passed along a note that contained threats, and the Court held that that failure to pass along was inadvertence. He was negligent but was not culpable under Section 1983.

As to all of these that same standard should apply with respect to 1983.

As to all the officers in their individual capacity as opposed to their official capacity, there is no evidence there and the judgment should be entered in their personal capacities as to each and every one of them. They were taking actions only as police officers and not personally with respect to the events that lead up to the death of James Buffington.

As to the state law claims, again we have immunity. As to Baltimore County, Maryland, the operation of a police department is a governmental function and in governmental [1160] versus proprietary the only issues that are involved there, and again operating the police department has held to be governmental, the only question is one of waiver and we have addressed that in our

memo; and clearly the case law both from the Court of Appeals of Maryland as well as from the 4th Circuit indicates that there has to be a specific waiver of governmental immunity, that it cannot be implied from the existence of a program of self-insurance.

With respect to the individual defendants they all have public official immunity and that immunity applies to nonmalicious acts performed within the scope of their authority. No question that they were undertaking acts in the scope of their authority, and the best that has been proven is that there was negligence with respect to their handling of this prisoner. There is no proof of malice. Malice must be proven to be actual malice, that is an act done without legal justification or excuse, an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff. There is no evidence of that at all.

Again, the very best that there can be is some evidence of negligence. Negligence is not actionable. Public official immunity specifically prohibits any actions on negligence in situations in which you have police officers exercising the police powers of the state. We have exactly that here. With respect to the state claims, all these [1161] officers have pubic official immunity that now requires, there being no proof of actual malice, that judgment be entered in their favor as to the state counts as well.

For all these reasons, Your Honor, we would ask that you take this case away from the jury. The various immunities no longer require there to be anything for the jury to adjudicate with respect to the liability of these officers, and we ask the judgments be entered in their favor. Thank you.

* * * *

APPENDIX F

[1175]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
VOLUME 10

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, Individually and as Personal Representative of the Estate of JAMES E. BUFFINGTON, DECEASED

and

DAVID M. BUFFINGTON, Individually

-v-

BALTIMORE COUNTY, MARYLAND, CORNELIUS J. BEHAN, *et al.*

The above-entitled matter continued on trial before the Honorable Joseph C. Howard, and a jury, commencing at 10:00 a.m. on January 17th, 1989, at Baltimore Maryland.

APPEARANCES

On behalf of the Plaintiffs:

William F. Gately, Esquire
Daniel W. Whitney, Esquire

On behalf of the Defendants:

John A. Austin, Esquire
James G. Beach, III, Esquire

* * * *

[1183] The plaintiffs' claims arise out of a suicide committed by their son James at the Wilkens Precinct prisoner lockup in the early morning hours of March the 19th, 1987.

Plaintiffs' claim can be broken down into two parts. The first part consists of constitutional claims and the second consists of state law claims for negligence.

Now, the first part of this case involves the constitutional rights of pretrial detainees. By detainees I mean persons in police custody who have not been tried or convicted of any crime. These constitutional rights of detainees place clearly defined constitutional duties on individual police officers, police chiefs, and municipalities such as counties.

In this case the plaintiffs claim that James Buffington's constitutional rights as a pretrial detainee were violated and that the defendants failed to comply with their duties under the constitution.

James Buffington was a detainee at the Wilkens Precinct on March 19th, 1987, and was in protective custody awaiting transfer to the hospital for an emergency psychiatric evaluation.

The constitution requires that police officers protect the safety of persons within their custody, and in the instructions that will follow I will inform you as to the [1184] precise nature of this duty.

Police officers have a specific constitutional duty to provide needed medical care to the persons within their custody. The constitution requires that medical care be given for psychological and psychiatric ills as well as physical ills. The constitution is violated by deliberate indifference to a serious medical need of a detainee.

The term deliberate indifference as used throughout these instructions has a precise constitutional meaning. Deliberate indifference exists when the conduct of any defendant gives rise to a strong likelihood, rather than mere possibility, that such conduct would result in harm to the detainee.

The plaintiffs need not prove that the conduct of the defendants was expressly intended or designed by them to cause harm to the detainee Buffington. It is only necessary that the plaintiffs prove that under the existing circumstances the defendants' conduct created a strong likelihood of harm to James Buffington.

If your ordinary understanding of the term or words deliberate indifference differs from the definition that I have just given you, you must disregard your usual understanding. As jurors you must apply the constitutional definition of deliberate indifference.

As a part of the constitutional duty to provide [1185] medical care, the constitution requires that police officers protect a detainee from committing suicide if they are aware that the person in their custody is suicidal and needs emergency psychiatric treatment. The failure to do so can amount to deliberate indifference in the constitutional sense.

Now, on the other hand, you are instructed that those who confine a detainee cannot be placed into a position of guaranteeing that a detainee will not commit suicide if they have no knowledge that he is suicidal.

You must consider the liability, if any, of each of the defendants separately and independently.

As to the constitutional claims, in order for you to return a verdict in favor of the plaintiffs and against the defendants Harvey, Gribbin, Yuska, Maeser, Tucker and Gaigalas, the plaintiffs must prove the following facts:

One, that these officers knew or should have known that James Buffington was suicidal;

Two, that their conduct in placing or permitting Buffington to be placed in a cell by himself created a strong likelihood that James Buffington would commit suicide while locked in the female cell;

And, three, that their conduct proximately caused the suicide.

* * * *

[1199] THE COURT: Mr. Austin.

MR. AUSTIN: Thank you, Your Honor. Your Honor, our first exception would be the Court's failure to give a good faith instruction under the federal claims, that is the federal good faith immunity, and again in that regard we would proffer to the Court our proposed instructions number 1, 2 or 3 is an appropriate definition or the definition given by the Court of Appeals in the footnote in Cooper versus Dyke, D-Y-K-E, 814 F.2d 941, an instruction given by Judge Harvey approved by the Court on that occasion. Under the federal claims federal instructions, Your Honor, the proximate cause instruction Your Honor gave was more of a reasonably foreseeable instruction rather than a proximate cause instruction.

THE COURT: I gave it twice.

MR. AUSTIN: Once for the state or federal claims. To avoid confusion there is a different standard for these claims. I ask the Court to give an additional instruction on proximate cause to instruct the jury proximate cause is proximate cause. There is no distinction. Again I think the instruction you gave, at that point in the instruction I think you were talking about the federal claims, did not go far enough in that regard.

THE COURT: Let me simply interject here. We have met three times to go over these instructions. I note that at [1200] least one of those times you weren't present. We gave counsel an opportunity to make any objections or corrections or change in language. I think that's a fair statement, isn't it?

MR. WHITNEY: Yes, it is, Your Honor.

MR. AUSTIN: .Yes, Your Honor. On one of those occasions I suggested the instruction from Cooper v Dyke the Court approved in footnote number 3, and we would again urge it to be given.

Your Honor, with respect to the instruction on deliberate indifference, Your Honor's instruction we feel does not go far enough. We would ask—there is nothing wrong with it as it's given, but we would ask the Court

to instruct the jury along the lines of the Cooper v Dyke instruction or the instruction—

THE COURT: When did you give that to the Court?

MR. AUSTIN: On Friday after the conference with Mr. Cook. I referred Your Honor's law clerk to the language in Molten versus City of Cleveland, 839 F.2d 240 at 243 and the statement of the Court in Matjer v Leis, 571 Fed.Supp. 918. We would ask that those instructions be given because of the language there, those cases being jail suicide cases that we feel is a necessary supplement to instructions that are already given.

Your Honor, with respect to the instruction that you gave that, I'm relying on memory but it was something to the [1201] effect that the police officers have a duty to protect an inmate from committing suicide, we would object to that instruction as not being law. The law is the officers have a duty to give medical care and not be deliberately indifferent to medical needs. There is no constitutional standard requiring inmates to be protected from committing suicide.

With respect to Your Honor's instruction about protecting an inmate, that protection instruction is not supported by the facts of this case. There was no evidence this inmate needed protection from anything else, that is other persons. Protection from other than committing suicide, which we have already argued is not the law, it's not the standard. The deliberate indifference standard is the standard. To go beyond that is to give the jury an additional reason for deciding against the officers.

Your Honor, with respect to the Court's definitions concerning Captain Kramer and Chief Behan, Your Honor has instructed the jury that the custom and policy must be unconstitutional, but I think what Your Honor should additionally tell the jury is custom and policy must be not only unconstitutional but the custom and policy must proximately cause the injuries complained of. I don't think that was highlighted sufficiently in the same context so the jury can tie it together.

Again I would object to Your Honor's instruction that [1202] any customs or policies known to Captain Kramer are a basis for imposing liability on Baltimore County. That is an error based on the facts of this case, which the testimony is clear Chief Behan alone makes policy for Baltimore County. He's the only policy maker, that is a defendant in this case. Captain Kramer, is not a policy maker and so therefore any actions or inactions on his part cannot be attributed to Baltimore County as making policy because he's not a policy maker. We would ask that the Court strike that part of the instruction because the facts do not support that instruction in this case.

Your Honor also gave an instruction on the missing evidence instruction, that we would ask the Court to strike because there is no missing evidence, there is no evidence that has not been produced.

THE COURT: I didn't say anything about missing.

MR. AUSTIN: I'm using that as a generic term. I don't think there was any testimony that any evidence was missing or suppressed or destroyed, so I don't feel it's supported by the facts of this case.

THE COURT: All right.

MR. AUSTIN: With respect to the instructions on Chief Behan and Captain Kramer about a policy of inadequate monitoring or supervision of detainees, we believe that instruction to be erroneous and invites a respondeat superior verdict against the chief and Captain Kramer or against [1203] Baltimore County.

There is no evidence of inadequate monitoring or supervision of detainees. We would object to that being given. It invites a verdict based upon a policy that has not been proven. The only policy that has been attributed to anyone was a policy that was facially constitutional, the Yuska/Perpura policy. That policy was facially constitutional and could not have caused any constitutional violations.

Your Honor, with respect to the Court's instructions under the federal courts with respect to punitive damages, again you have identified reckless and callous indifference

to constitutional rights of the plaintiff and equated that with the standard to overcome deliberate indifference, and we feel that is incorrect, that the standard for punitive damages should be actual malice.

Your Honor, with respect to the state instructions, we would object to the Court's refusal to give the instruction on public official immunity. We feel it is raised in the case. It has been raised throughout the case and is part of this case and the jury should be instructed on it. It's an affirmative defense and I object to Your Honor's failure to giving an instruction on it.

With respect to the actual malice instruction required for an award of punitive damages under state law, we feel that same instruction should be given with respect to [1204] federal law, with the exception that there should be no instruction on implied malice. The standard is one of actual malice and implied malice is not the law. Implied malice appears in constructive fraud cases, slander and deceit cases, but not a case like this.

Finally, with respect to the negligence counts as such the jury should be instructed and the sheets should be revised to show no punitive damages should be awarded for negligence to anyone. You only instructed the jury that the estate can recover punitive damages and not Mr. and Mrs. Buffington as state law plaintiffs. As to that point, Your Honor, we would strongly object to there being any allowance of punitive damages in favor of any party as to the state law counts.

We would cite for Your Honor's reference Medina versus Meilhammer, 62 Md.App. 239, in which the Court reversed the judgment entered for punitive damages with respect to a negligence action and it did so in language that says that what is required as a legal equivalent of malice is conduct of an extraordinary outrageous nature. There is no evidence of that kind of conduct in this case and therefore punitive damages as a claim should not go to the jury.

Finally, Your Honor, with respect to Your Honor's instruction concerning state law claims and the instruc-

tion of Baltimore County can be found liable under what I will term a [1205] respondent superior instruction should not have been given in Baltimore County, it should be dismissed. That's the state law claims. There is no basis for that instruction because as a matter of law they should not be in the case.

Again as to that point also, if Your Honor were to give the public official immunity instruction, the jury would have before them a necessary finding the individual officers are immune by virtue of their public official immunity, then Baltimore County is also immune because the principal cannot be liable to the agent if he's not liable.

Finally, Your Honor, we would ask the Court at this time to dismiss Mr. Maeser, Officer Maeser, as a defendant based upon the concession made in closing argument by Mr. Gately that really there was no evidence against him. There is no point sending this case to the jury and keeping Officer Maeser on the hook as to this case. In view of that there simply is nothing for the jury to decide. We would ask that Officer Maeser be dismissed, the verdict sheet be amended so as to strike his name out, Your Honor, enter a judgment in his favor at this time as a matter of law, instruct the jury not to consider his liability at all.

THE COURT: Don't say finally again.

MR. AUSTIN: That would be all I have, Your Honor.

THE COURT: Let me just ask, when this case goes up counsel recognize and include in their brief the fact we had a [1206] first meeting on instructions and you weren't there, the second meeting I believe on instructions you weren't there, and at each of these conferences we went over these instructions word by word and I made those changes that I thought reflected the discussion of everyone. I just think the Court above should know what took place. It's hard to keep up with one who makes objections and corrections are made, then another person comes in.

* * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

[Filed Jan. 27, 1990]

Baltimore County, Maryland, Cornelius J. Behan, Officer Ronald L. Tucker, and Officer Donald Gaigalas, Defendants, by their undersigned attorneys, move this Honorable Court pursuant to Rule 50 of the Federal Rules of Civil Procedure for a directed verdict in favor as a matter of law, or, in the alternative, for the entry of a Judgment notwithstanding the verdict and as grounds therefore state as follows:

1. That the within proceedings were tried before a jury, which Jury returned a verdict on or about January 19, 1989, as reflected in the attached Verdict Sheet, a copy of which is attached hereto and prayed to be made a part hereof and is marked Exhibit "A".

2. Prior to the case being submitted to the Jury, all of the Defendants moved for a directed verdict in their favor at the close of all of the evidence asking that the

Court enter Judgment in their favor as a matter of law. At that time, this Court reserved its ruling on that Motion and no further ruling has been made on said Motion subsequent to the conclusion of the trial as aforesaid.

3. That prior to the commencement of the aforesaid trial, an earlier Motion for a Directed Verdict or for Judgment Notwithstanding the Verdict was filed on behalf of these same Defendants on or about December 2, 1988. Said Motion has not been ruled upon at this time, as the Court has reserved its rulings until after the Jury has returned its verdict.

4. That because of the verdicts returned by the Jury, the Motions are moot with respect to certain of the Defendants, namely, the Defendants Corporal (now Sergeant) Joseph Gribbin, Officer L. S. Harvey, Sergeant Daniel Yuska, Officer William L. Maeser, and Captain Kenneth W. Kramer. Pursuant to the provisions of Rule 50 of the Federal Rules of Civil Procedure, the Defendants, Baltimore County, Maryland, Cornelius J. Behan, Officer Ronald L. Tucker, and Officer Donald Gaigalas, are now entitled to have the rulings previously reserved by this Court reviewed and adjudicated as a matter of law at this time.

5. That as a matter of law, there is no Federal survivorship action as alleged in Count II of the Amended Complaint, and therefore, the verdicts rendered under the Federal claims in favor of the Plaintiffs should now properly be stricken as a matter of law.

6. That the verdicts that were returned in favor of the Personal Representative of the Estate of James Buffington for the conscious pain and suffering suffered by the Plaintiff's Decedent should properly be stricken as there was no evidence presented before the Jury that the Plaintiff's Decedent suffered any conscious pain and suffering in the moments prior to his death. Accordingly, the verdict rendered on these claims by the Jury should properly be stricken as a matter of law.

7. That the Defendants because of the immunities available to them, particularly including, qualified good faith immunity with respect to the Federal Claims, are entitled to have this Court enter Judgment in their favor as a matter of law.

8. These Defendants incorporate by reference the previous arguments presented during the aforesaid trials in connection with the Motions for Directed Verdict made at the close of all of the evidence. In addition, the Defendants incorporate herewith by reference the attached Memorandum of Points and Authorities submitted in support of this Motion.

For the reasons stated, the Defendants, Baltimore County, Maryland, Cornelius J. Behan, Officer Ronald L. Tucker, and Officer Donald Gaigalas respectfully request this Honorable Court enter directed verdicts in their favor as a matter of law and that Judgments be entered on these verdicts in their favor, assessing costs against the Plaintiffs as appropriate.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

* * * *

IV. *Individual Defendants—Federal Claims*

The Jury returned verdicts under 42 U.S.C. Section 1983 against Chief Behan and Officers Turcker and Gaigalas. As has been noted previously, these verdicts are inherently inconsistent with the verdicts the Jury also returned under the negligence counts against these same individuals. The Plaintiffs were required to prove that each of the individual Defendants Behan, Tucker and Gaigalas were deliberately indifferent in their handling of Mr. James Buffington, specifically they were required to prove facts that "clearly evince the medical need in question and the alleged official dereliction, namely, 'wanton actions' on the part of the Defendants." *See Johnson v. Treen*, 759 F.2d 1236 (5th Cir., 1985). As to Chief Behan, if he was merely negligent in his management of the Police Department, then Judgment should be entered in his favor as there is no respondeat superior liability on his part as Chief of Police for the wrongful acts of subordinates. *See Spell v. McDaniel, supra.* No proof was presented at trial evidencing any conduct on the part

of Chief Behan that demonstrated that he managed the Department recklessly or with wanton disregard for proper police standards. At best, the testimony from the Plaintiffs' experts was to the effect that the Chief had failed perhaps to implement every conceivable management practice or program of training to prevent suicides. However, such failures do not amount to wanton conduct that was required to prove deliberate indifference. *See Roberts v. City of Troy*, 773 F.2d 720 (6th Cir., 1985). Moreover, there is no case law requirement within this Circuit that imposes upon police managers the requirement that all possible precautions be taken in order to avoid liability under 42 U.S.C. Section 1983. Indeed, even to sustain a verdict for negligence against Chief Behan, it will be necessary for there to be testimony establishing the appropriate standard of care. As noted previously, there was no such testimony presented during the trial of this case. Assuming, arguendo, that the standard of care had been established, no evidence was adduced that Chief Behan's conduct was more than merely negligent with respect to his management of the Police Department. Accordingly, the verdict against Chief Behan should properly be stricken, and the Federal claims against him dismissed as a matter of law.

With respect to Officer Tucker, there was simply no causal connection between any conduct on his part and the placing of Mr. Buffington in a detention cell. It was undisputed that Officer Tucker had no input into the decision to place Mr. James Buffington into a detention cell, as he did not speak with either Officer Harvey or Officer Gaigalas prior to Officer Gaigalas placing Mr. Buffington in a cell. However, Officer Tucker did not command, direct or even assist Officer Gaigalas in placing Mr. Buffington into a detention cell, nor did he have any other contact with him that would have put him on notice that Mr. Buffington was so overtly suicidal that he was required to be detained at the bar in the desk area. The testimony is clear that only Officer Gaigalas

had this information and that Officer Gaigalas did not communicate this to Officer Tucker. Accordingly, the Jury's verdict against Officer Tucker cannot be sustained for there is no evidence that *any* conduct of his proximately caused the death of Mr. Buffington. Further, there is no evidence that Officer Tucker was deliberately indifferent to Mr. Buffington's serious medical needs, or that he even had actual knowledge of the nature and extent of Mr. Buffington's medical needs. As has been repeatedly argued throughout these proceedings, proof of deliberate indifferent requires evidence which clearly demonstrates knowledge of the medical need in question and conduct with respect to the prisoner and the known medical need that wantonly or recklessly disregarded the seriousness of the medical need. *See Sosebee v. Murphy*, 797 F.2d 197 (4th Cir., 1986). As to Officer Tucker, there is no evidence that he had knowledge of the full nature and extent of Mr. Buffington's emotional deterioration sufficient to require him to intervene and overrule Officer Gaigalas' handling of the situation. In short, there was no conduct on his part that was deliberately indifferent to a known serious medical need of Mr. Buffington. There was, therefore, no basis upon which the Jury could return a verdict against him, and thus, the same verdict should now properly be stricken and Judgment entered in favor of Officer Tucker.

With respect to Officer Gaigalas, at best, the evidence adduced against him demonstrates mere errors in judgment on his part or an inadvertent failure to take appropriate action by maintaining Mr. Buffington at the bar. There was no evidence of wanton or reckless conduct on the part of Officer Gaigalas, and the Jury's verdict rejecting the Plaintiffs' claims for punitive damages is evidence that the Jury felt that no wanton or reckless conduct had been proven. Indeed, the Court's instructions on this point were to the effect that the standard for finding deliberate indifference was the same standard required for awarding punitive damages. If it is assumed

that the Jury faithfully followed these instructions, then their verdict denying punitive damages of necessity required a factual finding that Officer Gaigalas was not wanton or reckless in his handling of Mr. Buffington. Because the standard of deliberate indifference and for punitive damages are the same, the Jury's verdict against Officer Gaigalas must have plainly rested upon findings by them that he was merely negligent in his conduct with respect to the safety of Mr. James Buffington. For all of these reasons, the verdicts against Officer Gaigalas should now properly be stricken, and Judgments entered in his favor as a matter of law.

* * * *

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 88-1161 (L)
CONS. W/89-1021, 1040, 1054 and 1055

BARBARA BUFFINGTON, *et al.*,
Appellees,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Appellants.

BRIEF OF APPELLANTS

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Arnold Jablon
County Attorney
Michael J. Moran
Thomas K. Farley
Assistant County Attorneys
Baltimore County Office of Law
Second Floor, Old Courthouse
Towson, Maryland 21204
(301) 887-5657
Counsel for Appellants

Robert B. Green
Charles M. Kerr
IRWIN, KERR, GREEN,
McDONALD & DEXTER
Suite 1133
250 West Pratt Street
Baltimore, Maryland 21201
(301) 659-5757

Counsel for Appellants

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 88-1161 (L), 89-1021,
89-1040, 89-1054

BARBARA BUFFINGTON, *et al.*,
Plaintiffs-Appellees

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants-Appellants

APPELLANTS' BRIEF

THE STATEMENT OF ISSUES

1. Is there a right which exists pursuant to the Fourteenth Federal Constitution which guarantees an individual, in the police custody as a result of a request for assistance from the family, protection by the State from suicide?

2. If no such right exists, are the individual Appellants immune from liability?

* * * *

ARGUMENT

I. THERE IS NO RIGHT WHICH EXISTS, PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH REQUIRES THE STATE TO PROTECT FROM SUICIDE THE INDIVIDUAL WHO COMES INTO CUSTODY OF THE STATE AS A RESULT OF A REQUEST FOR EMERGENCY ASSISTANCE FROM THE FAMILY.

The Due Process Clause of the federal constitution imposes upon the State [11] no duty that the State protect an individual from suicide, when that person has come into the custody of State agents as a result of a request for emergency assistance by the family. The Due Process Clause, by its own terms, is a restraint [12] against the government's exercise of power, against its citizens, in either an arbitrary or oppressive manner. That Clause of the Constitution is "not . . . a guarantee of certain minimal levels of safety and security. It forbids the State . . . to deprive individuals of life, liberty, or property, without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. ——, 109 S. Ct. ——, 103 L.Ed.2d 249 at 258-59 (1989) (holding that the Department was under no obligation to protect a child from violence of the custodial parent, where the social workers knew of the father's violent propensities).

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[11] For purposes of actions initiated under Title 42 U.S.C. Section 1983, "State" includes local governments and municipalities. *Monell v. Department of Social Services*, 436 U.S. 659, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978).

[12] "[N]or shall any State *deprive* any person of life, liberty, or property, without due process of law. . . ."

Here, the record is clear that James Buffington came into the custody of Baltimore County police officers upon the receipt of a request for emergency assistance by James' brother and sister-in-law (Apx. 1068-1103; 1104-23; 1124-1201). Police began to prepare the paperwork associated with the incident, including a petition for an emergency psychiatric evaluation at a local hospital (Apx. 1124-1201). It is undisputed that suicide was the cause of death.[13] It would therefore be anomalous, following *DeShaney v. Winnebago County*, *supra*, to hold the State accountable for the suicide, when the Due Process Clause affords no relief against the State for injuries which result from the violence of a third person.

This construction of the Due Process Clause is entirely faithful to the framers' intent and is consistent with jurisprudence of the Supreme Court that, in other contexts, has held that the limitations imposed upon the government through the Eighth and Fourteenth Amendments created a guaranty to individuals in police custody of reasonable medical care and treatment. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L.Ed.2d 251 (1976) (Eighth Amendment protection against cruel and unusual punishment requires provision of medical care to prisoners); *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 103 S. Ct. 2979, 77 L.Ed.2d 605 (1983) (Due Process Clause of the Fourteenth Amendment requires responsible governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by police).[14] The philosophy which underpins either line of this authority is that the State's deprivation of the individual's liberty

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[13] *Compare, e.g., Spell v. McDaniel*, 824 F.2d 1380 (1987), where the cause of injury was overt acts of police brutality.

[14] There is also a substantial corpus of law among the federal circuit and district courts which has recognized the prisoner's or detainee's right to protection from suicide through the provision of medical care and treatment. *See, e.g., Patridge v. Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986).

renders the individual unable to attend to his own medical needs. Accordingly, it is necessary for the State to provide such care for the person. Otherwise, a failure to provide the required medical care would constitute an abuse of power, through the State's inaction, proscribed by the limitations of the Eighth Amendment's "cruel and unusual punishment" clause and the Due Process Clause of the Fourteenth Amendment *DeShaney*, *id.*, 103 L.Ed.2d at 262. Moreover, the State's deprivation of the liberty of either the convict or the apprehended detainee vindicates peculiar State interests: punishment of the convict or detention of the apprehended detainee, incident to the process of the criminal law. Thus, the State's exercise of power, through the criminal law, modifies the status of the person, permissibly, to that of either a convict or a pre-trial detainee, but only to the extent of the protections afforded the person by the Eighth and Fourteenth Amendments. One must, however, read either line of authority in the context of the State's motive which occasioned the deprivation of individual liberty. In one case, the State takes from the individual his liberty as a punishment. In the other, the State deprives the individual of liberty in order to subject that person to the criminal law and potential punishment. Neither case, however, addresses the question of what, if any, right(s) the Fourteenth Amendment creates in favor of a suicidal individual whom the police take into custody, in answer to a distress call from the family, in an effort to *give* assistance and psychiatric care, in contrast to the situation where the State either takes or retains custody over an individual for the purpose of subjecting the person either to punishment or the criminal process.[15]

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[15] The "game plan," according to the testimony of Officer Lewis Harvey, was to seek an emergency psychiatric evaluation at the Greater Baltimore Medical Center, upon application of a petition (Apx. 1137). The petition process is established pursuant to MD. HEALTH-GEN'L CODE ANN. (1982 Repl. Vol), Title 10, Section 10-

II. IF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT CREATE A DUTY UPON THE STATE TO PROTECT THE INDIVIDUAL FROM SUICIDE, THEN THE INDIVIDUAL APPELLANTS ARE ENTITLED TO ASSERT AND PREVAIL UPON THE DEFENSE OF QUALIFIED IMMUNITY.

Absent a constitutionally secured right, which in turn may give rise to a duty, the State officer may assert and prevail upon the doctrine of qualified immunity. The absence of such a right precludes "contouring" of the right and it becomes impossible to argue that the State officer should have known of something which did not exist; *see Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982); *Anderson v. Creighton*, —— U.S. ——, 107 S. Ct. 3034, 9 L.Ed.2d 523 (1988). Accordingly, this Court must reverse the judgment entered against Appellants Behan, Gaigalas, and Tucker.

620, Part IV, "Emergency Evaluations." Part IV is one of five parts of Subtitle 6, Title 10, which, in turn, is a statutory scheme covering various types of admissions, e.g., voluntary, involuntary, etc. The Statement of Charges Harvey contemplated completing was suggested to the family, and agreed upon after consulting with counsel, as a means of maintaining control ovr Buffington if the hospital rejected the emergency petition (Apx. 1150; 1081-85). The "fall back" position was that police would retain control over Buffington until the family was able to procure a commitment (Apx. 1082).

III. ASSUMING THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GIVES RISE TO A DUTY UPON THE STATE TO PROVIDE PROTECTION FROM SUICIDE, THE EVIDENCE ESTABLISHES THAT THE PROXIMATE CAUSE OF THE SUICIDE WAS THE ACTION OF THE INDIVIDUAL DESK OFFICER ALONE, AS OPPOSED TO ANY IDENTIFIED DEFICIENCY IN THE COUNTY'S POLICE TRAINING.

* * * *

Here, the proximate cause of suicide, leaving aside the question of whether the incident was the result of a voluntary, deliberate choice by the decedent, was the act of Appellant Gaigalas of placing decedent in a cell, unobserved and alone. Gaigalas' act was done with knowledge of decedent's condition (Apx. 1407-08). Despite the fact that Gaigalas knew of other similar occurrences and should have appreciated the consequences that might result (Apx. 1402-05), Gaigalas still placed decedent into the cell. Finally, Gaigalas ignored the standing orders of his shift officer that a potential suicide was to remain handcuffed to the bar, under constant observation, at all times (Apx. 1405). Assuming, for argument's sake, that there existed a lack of in-service training occasioned by the deliberate indifference of a corporate policy maker, such deficiency was not the "moving force" behind the incident. "Adequate" training would only have supplied information that every police officer, summonsed by Appellees to testify, already knew: suicidal persons should be kept under constant observation at all times and not isolated. Gaigalas knew this without having had the benefit of such training. Section 1983 affords one relief from the exercise of poor judgment, the failure to follow orders, or blatant stupidity. As the District Court described the situation, "it was [un]necessary for the police to obtain a Ph.D. in order to refrain from placing a known suicidal person in an isolated cell with his pants

on. A semi-clear head and a normal degree of common sense would have sufficed" (Apx. 964-65). If common sense and/or a semi-clear head is all that is required, training is irrelevant. Thorough training does not mean that the trainee is going to use it. Gaigalas' ill-conceived actions, and those alone, are the proximate cause of the incident. Accordingly, the Court erred in submitting the case to the jury and this Court must reverse the judgments entered against Appellants.

* * * *

VI. THE DISTRICT COURT COMMITED REVERSIBLE ERROR WHEN IT INSTRUCTED THE JURY.

Reversal of judgment may be appropriate when the lower court erroneously instructs the jury regarding the applicable law. The Court instructed the jury upon the duties and responsibilities of Tucker and Gaigalas, the individual desk officers (Apr. 2243-46), Baltimore County (Apx. 2246-49), Chief Behan and Captain Kramer (Apx. 2249-50). The Court also instructed the jury regarding the rights of suicidal persons in the custody of police (Apx. 2244-45).[52] The Court appears to have instructed the jury under the "policy" prong and the custom prong (Apx. 2247-48).

The Appellees' claim appears to revolve around the contention of inadequate training and/or supervision. Local governments may be held accountable for *municipal* acts or policies, or for the decisions or policies of those who may be said to act in behalf of the government: policymakers. *Monell v. New York City D.S.S.*, 436 U.S. 6581, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978); *City of Canton v. Harris*, 489 U.S. ——, 109 S. Ct. ——, 103 L.Ed.2d 412 at 424 (1989). A single incident, based upon a facially unconstitutional policy may result in Section 1983

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[25] For the reasons stated previously, these instructions as to the rights of detainees were erroneous.

liability, *Monell v. New York City D.S.S.*, *id. City of Canton v. Harris*, *id.*, considered the question of whether municipal liability would result from "a concededly valid policy . . . unconstitutionally applied by a municipal employee" if the injury results directly from the municipality's inadequate training (103 L.Ed.2d at 425. The Supreme Court concluded that, in such a case, a cause of action would exist only where the failure to train amounted to deliberate indifference to the rights of persons with whom police come into contact, and the failure to train was the moving force behind the violation, *Canton*, *id.*, at 426-28. It would seem that the "failure to train" must itself represent municipal policy, i.e., a "deliberate choice to follow a course of action . . . made from various alternatives. . . ." *Canton*, *id.*, at 427. It would also appear that the policymaker's mental state is directly in question: The failure to train must be the "conscious" choice. *Canton*, *id.*, at 427. The failure to train must evidence "deliberate indifference." *Canton*, *id.*, at 427.

There would seem to be some deficiencies in the Court's instructions. First, with respect to the County under the policy prong (Apx. 2246), the Court instructed that in order for the plaintiffs to prevail, the law required them to "prove that the failure to prevent the suicide . . . resulted from an unconstitutional policy of Chief Behan. . . ." There would seem to be no evidence to support this instruction. First, the only policy made by Behan that would attach liability to the County was the CALEA standard, which would appear to be constitutional (Apx. 2162-67; 2380; 1593-1600); generally, 1575-1592; 1600-1604). Thus, reversal may be required because of lack of evidence as to the unconstitutionality of the CALEA standard. However, assuming for argument's sake that the claim may nevertheless sound as one of unconstitutional application, by virtue of inadequate training, of a facially constitutional policy, other problems seem to exist. The instruction fails to define "policy." The jury is not required to find that the "lack of training" was a

"deliberate" or "conscious" choice made among alternatives.[26] Moreover, the instruction permits the jury to assign liability to the County for Behan's "failing to provide constitutionally[27] adequate training. . . ." *Canton* seems to require that the failure to train properly must be the "moving force" that caused the violation and, evidently, the *only* cause. Finally, there is no requirement that the jury find that the failure to train, by Behan, was "deliberately indifferent." Thus, the jury is free to assign liability to the County merely by virtue of Behan's failure to train. Respectfully, *Canton* seems to require more. *Id.* at 426-27.[28, 29] This Court must reverse because the instructions permit the jury to attach liability to the County upon an overbroad standard.

The Court also instructed the jury that it could consider "a failure to conduct thorough investigations into prior episodes of police misconduct may be considered as evidence of the policy of nonsupervision of police offers

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[26] Contrast the CALEA policy: Presumably, the Chief could have selected the AMA, ACA, or NCS standard.

[27] The instructions do not seem to define when training is considered "constitutionally adequate."

[28] "Monell's rule that a city is not liable under Section 1983 unless a municipal policy causes a violation will not be satisfied by merely alleging that the existing program . . . represents a policy for which the city is responsible . . . if [the training] is [not] adequate . . . the question becomes whether such inadequate training can justifiably be said to represent 'city policy,'"

which in turn implicates the policymaker's state of mind: conscious choice *not* to train.

[29] Appellees produced much testimony regarding training of police (Apx. 2130-57; 2158-64). That the implementation of training is left to subordinates (Apx. 2198-2204) would seem to impose no constitutional fault upon Behan, even if the failure to train which occurred at that level, produced the constitutional injury. *City of St. Louis v. Proprotnik*, 485 U.S. ——, 108 S. Ct. ——, 99 L.Ed.2d 107 at 120, 122 (1988).

amounting to deliberate indifference. . . ." The Court continued that:

> subsequent acceptance of deliberate indifference to the *decedent's* constitutional rights by a person who makes policy, such as Chief Behan *or other high ranking police officers*, may be evidence of County's policy.
>
> A cover up instead of an exposure of possible unconstitutional actions may be considered evidence of a policy. In this regard, plaintiffs have alleged that there was a supeficial investigation of Buffington's suicide. If plaintiffs prove by a preponderance of the evidence that the investigation was superficial, then this may be used by you as evidence of a policy of non-supervision of its police officers by Behan or Kramer or Baltimore County which may amount to deliberate indifference (Apx. 2248-49).

Again, there is no definition of "policy." Moreover, the instruction seems to permit the jury to fasten liability upon the County as a result of the "acceptance of deliberate indifference to the decedent's constitutional rights by a person who makes policy such as Behan or *other high ranking police officers*. . . ." Thus, the jury could have attached liability to the County through Kramer, who counsel argued was not a policymaker (Apx. 2261-62), or any other "high ranking" officer who testified. The instruction seems to permit the jury to conclude that a "policy" of nonsupervision exists as a result of the one superficial investigation of Buffington's suicide." Assuming for argument's sake that there was a "cover up" or "superficial investigation," such must have been the responsibility of the policymaker—here, Behan. But, this record indicates that "command investigations" travel up the chain of command (Apx. 2174-76). And, the fact that the policymaker has delegated discretion to subordinates to conduct an investigation and make findings does not impose liability, through the policymaker, upon the

County. *City of St. Louis v. Proprotnik, id.* The Court's instruction, however, permits such a finding and, accordingly, this Court must reverse.

The Court instructed upon the liability of Behan and Kramer (Apx. 2249) and concluded this portion of the instruction, that:

> The liability of Chief Behan and Captain Kramer must be assessed separately and may be established by proof of the following three elements: One, that Chief Behan or Captain Kramer maintained an unconstitutional policy or custom toward suicidal detainees or, in the alternative, had actual or constructive knowledge of the existence of such a policy or custom;
>
> Two, that Chief Behan and Captain Kramer had the authority to correct such policy or custom, but with deliberate indifference failed to do so;
>
> Three, that Chief Behan and Captain Kramer should have foreseen as reasonably probable that such action in maintaining such a policy or custom or in failing to correct it and, with respect to proximate cause, set in motion series of acts which made the suicide almost bound to happen sooner or later, rather than merely likely to happen in the long run.
>
> If you find these three elements have been established as to Chief Behan or Captain Kramer or both, you must return a verdict against Baltimore County.

The problem with the instruction is that it permits the jury to return a verdict against the County upon findings made as to Kramer. There would seem to be no finding that Kramer occupied such a position.

Finally, the instructions permit the jury to return a verdict against the County based upon a finding of an "unconstitutional custom" of "Behan and Kramer" (Apx. 2247), and "Behan or Kramer" (Apx. 2249). It seems

questionable, in light of *Canton*, whether there exists such a theory. As the Supreme Court noted, the "custom" theory of liability was essentially the same as the policy theory of liability.[30] But, if custom is a viable theory in the context of failure to train, here there was insufficient evidence to support the instruction. Although Plaintiffs produced testimony regarding 57 suicides between 1975 and 19 March 1987, the CALEA standard was placed in effect in 1984; and as Behan testified, evidently implementation was the responsibility of subordinates (Apx. 2200). Moreover, for a "custom" theory to succeed here, it would seem that the individual police officers ought to have knowledge of the person's suicidal tendencies before detaining or taking the person into custody. Suicides, committed in a lockup, without more, do not necessarily lead to the conclusion that training is lacking, if the custodians are not on notice of anything which would call for the application of such training. In this regard, the suicide survey, at least since 1984 when the County placed itself under CALEA, does not seem to indicate clearly, in each case, which of the incidents involved prior notice or knowledge, by the police of suicidal tendencies (Apx. 2285-99). Moreover, Behan testified that he did not disregard incidents of suicide (Apx. 2170-73; 2186-92). The testimony indicates that Behan was aware of suicides, but also that the incidence was decreasing in relation to the population arrested (Apx. 2186-92). With respect to the command investigations of which Behan knew or should have known, Behan could have relied upon the exercise of discretion and findings of the officers in the chain of command; *Proprotnik*, *id.* Neither the fact of the suicides nor the manner of investigation can attach liability to the County through Behan.

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[30] Admittedly, Mrs. Harris presented but a single instance of alleged unconstitutional policy or custom.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs

v.

BALTIMORE COUNTY, *et al.*,
Defendants

MEMORANDUM AND ORDER

[Filed May 17, 1988]

James E. Buffington committed suicide by hanging himself on the morning of March 19, 1987, in a holding cell at the Wilkins Police Station in Catonsville, Maryland. Barbara and David Buffington bring this suit on their own behalf. Barbara Buffington also brings suit as the mother of James and as personal representative of her son's estate. Through their four-count complaint, plaintiffs seek relief pursuant to 42 U.S.C. § 1983 (Counts I and II) and also bring two pendant state law claims, one for wrongful death (Count III) and one for survival (Count IV).

Named as defendants are Baltimore County, Maryland, the County's Chief of Police, Cornelius Behan, and four members of the Baltimore County Police Department. They are Sergeant Yuska, Corporal Gribbin, Officer Harvey and Officer Gaigalas. Plaintiffs also name unidentified officers of the Police Department.

Defendants have filed a motion to dismiss or, in the alternative, for summary judgment. (Paper #12). Plaintiffs responded. (Paper #15). The matter is ripe for disposition and no hearing is necessary. Local Rule 6(G).

The Court will construe the motion as one to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The grant of a motion to dismiss for failure to state a claim on which relief can be granted is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). In ruling upon the pending motion to dismiss, this Court must view the complaint in the light most favorable to plaintiffs, resolving every doubt in their behalf. 5 Wright & Miller, *Federal Practice and Procedure* § 1357 (1969). Further, the Court must accept plaintiffs' allegations as true at this stage of the litigation. *Hishon v. King & Spalding*, 467 U.S. at 73.

To state a claim under 42 U.S.C. § 1983, plaintiffs must allege that (1) defendants deprived Buffington of a right secured by the Constitution or law of the United States and that, in doing so, (2) the defendants acted under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

In attacking the complaint, defendants concede the "under color of state law" requirement but take aim at the first prong, contending there is no "constitutional duty to discover the latent suicidal tendencies" of Buffington. In addressing this contention, the Court must first identify Buffington's status at the time of his detention in the Wilkins Police Station. Clearly, he was not a prisoner incarcerated as a result of a criminal conviction. Accordingly, the Eighth Amendment right to be free from cruel and unusual punishment does not apply because that right attaches only to criminals serving a

sentence. *Ingraham v. Wright*, 430 U.S. 651, 670-671 n. 40 (1977). The Court believes Buffington was a pretrial detainee, therefore, according to *Ingraham*, "the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." *Id.* at 671-672 n. 40. However, in this case an analysis under the Fourteenth, rather than Eighth, Amendment is a difference without a distinction because a pretrial detainee has due process rights at least as great as the Eighth Amendment protections accorded to a convicted prisoner. *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983); *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988). Indeed, a pretrial detainee has a Fourth Amendment due process right to be free from punishment altogether. *Bell v. Wolfish*, 441 U.S. 520 (1979).

The relevant inquiry under the Due Process Clause is whether a pretrial detainee is punished prior to an adjudication of guilt in accordance with due process of law. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). A closely related question is whether there exists a constitutional duty in favor of a pretrial detainee to be protected from suicide. That question seems to turn on whether the pretrial detainee's suicidal tendencies are latent or obvious. *Cf. Gagne v. City of Galveston*, 805 F.2d 558 (5th Cir. 1986), *cert. denied sub nom., Gagne v. Putnam*, 107 S.Ct. 3266 (1987) (for a subsequent ruling in that case see *Gagne v. City of Galveston*, 671 F.Supp. 1130 (S.D. Tex. 1987) *with Danese v. Asman*, 670 F.Supp. 729, 735 (E.D. Mich. 1987). *See also Partridge v. Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986); *Danese v. Asman*, 670 F.Supp. 709 (E.D. Mich 1987); *Strandell v. Jackson County*, 634 F.Supp. 824 (S.D. Ill. 1986); *Holland v. Breen*, 623 F.Supp. 284 (D. Mass. 1985); *Madden v. City of Meriden*, 602 F.Supp. 1160 (D.Conn. 1985); *Guglielmoni v. Alexander*, 583 F.Supp. 821 (D. Conn. 1984); *Matje v. Leis*, 571 F.Supp. 662 (1983); *Miga v. City of Holyoke*, 398 Mass. 343, 497 N.E.2d 1 (1986).

A violation under the Fourteenth Amendment exists where a detainee's suicidal tendencies are obvious to those confining him. This approach seems consistent with *Bell v. Wolfish*, 441 U.S. 520, 537 (1979), because knowledge or notice that a detainee is capable and perhaps willing to take his own life converts an otherwise lawful confinement into punishment when the jailors show deliberate indifference to the confined's capacity or ability to kill himself.[1]

Plaintiff's complaint, far from defendants' characterization as *latent* suicidal tendencies by Buffington, reveal that, if taken as true, the defendants had ample notice of Buffington's ability to take his own life. Buffington lived with his parents, but on March 19, 1987, his parents were vacationing. Alone, Buffington penned a suicide note, left it on the dining room table, broke into his father's gun collection, took at least five guns and ammunition, and drove off in his father's car.

Buffington's brother lived next door. He knew his parents were away, and he knew Buffington did not have a valid driver's license. Therefore, he ran over to his parents' house and found lights on and music blaring. He also found the suicide note and noticed the gun closet had been forced open. He called "911", reporting a potential suicide. Defendants Harvey and Gribbin arrived

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[1] The Court notes that "deliberate indifference" is a legal term of much significance in the context of *Estelle v. Gamble*, 429 U.S. 97 (1976), which was a case involving a convict, thus invoking the Eighth Amendment. But in this Circuit, the Eighth Amendment cannot be ignored when assessing a pretrial detainee's Fourteenth Amendment claims. A comparison is useful. *Cooper v. Dyk*, 814 F.2d 941, 948-49 (4th Cir. 1987); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978). *See also Norris v. Frame*, 585 F.2d 1183, 1186-87 (3d Cir. 1978); *Jensen v. Conrad*, 747 F.2d 185, 194 n. 11 items 1 and 3 (4th Cir. 1984) (noting an affirmative duty of protection under the Fourteenth Amendment where a "special relationship" accrues when factors such as custody and notice are a part of the relationship).

on the scene at 5:05 a.m., read the suicide note, then left in search of Buffington. At 6:25 a.m. Harvey telephoned, informing Buffington's sister-in-law that Buffington had been found alive. Buffington told the police that the only reason he was found alive was because he could not decide which gun to use. Later, the police called Buffington's brother and told him they were getting the papers together so that Buffington could receive emergency psychiatric evaluation at a hospital. Also, defendant Harvey advised Buffington's brother to press criminal charges against Buffington. According to Harvey, this would serve as a safeguard, allowing the police to detain Buffington should he be refused emergency psychiatric treatment.

While completing the paperwork, the police put Buffington alone in a holding cell. There, he hung himself with his pants as a noose. In sum, as alleged, plaintiff states a cause of action. Buffington's suicidal tendencies were not latent; they were ubiquitous.

* * * *

In accordance with the foregoing, it is this 17th day of May, 1988, by the United States District Court for the District of Maryland, ORDERED:

1) that defendants' motion to dismiss BE, and the same hereby IS, DENIED in full; and

2) that the Clerk mail copies of this Memorandum and Order to counsel of record.

/s/ Joseph C. Howard
JOSEPH C. HOWARD
United States District Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MOTION TO RECONSIDER

[Filed June 13, 1988]

Baltimore County, Maryland, et al., Defendants, by their undersigned attorneys, respectfully request that this Honorable Court reconsider the rulings contained in its Memorandum and Order filed on May 17, 1988. This Motion is filed pursuant to Rule 7(b) and in support thereof, Defendants say:

1. The Defendants respectfully disagree that the Decedent, David Buffington's suicidal tendencies were obvious to the officers at the Wilkens Station who were charged with the duty of detaining and processing him. The facts as alleged by the Plaintiffs indicate that, at the time of the arrest, Mr. Buffington was calm and docile and that he exhibited no overt suicidal tendencies. Accepting all of the facts pleaded as true, a significant amount of time elapsed between the time that the police were notified of Mr. Buffington's disappearance and his apprehension. He showed no inclination to take his own life between the time of his apprehension and the time

he was placed in the holding cell. Given these facts, it is submitted that none of the officers involved in arresting or processing the Decedent acted in any way to deprive him of his Due Process rights under the 14th Amendment. There is no indication that Mr. Buffington was, in the least, overtly suicidal during any phase of his detention.

Even assuming, *arguendo*, that the officers involved knew of Mr. Buffington's suicidal tendencies, that alone does not attach liability to their actions. This Court, in its Opinion, makes reference to the "deliberate indifference" standard set forth in this Circuit in *Cooper v. Dyke*, 814 F.2d 941 (4th Cir. 1987) and other cases. It is submitted that the standard of "deliberate indifference" is inapplicable to the police officers in this case. Clearly, if the officers knew of Mr. Buffington's suicidal tendencies and had done nothing to secure medical attention, a claimed violation of his constitutional rights would have been stated. But the Complaint alleges, correctly, that the officers at the Wilkins Station were making every effort to have Mr. Buffington committed for a psychiatric evaluation. In addition, Mr. Buffington was stripped of every article of clothing except his blue jeans in an effort to protect him from himself. These actions can hardly be characterized as deliberate indifference to the Decedent's plight. It is, therefore, submitted that none of the actions of the officers constitute "deliberate indifference" or an actionable constitutional violation. *See Sasebee v. Murphy*, 797 F.2d 179 (4th Cir., 1986).

* * * *

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JH-87-3284

BARBARA BUFFINGTON, *et al.*,
Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Defendants.

MOTION TO AMEND INTERLOCUTORY ORDER

[Filed Oct. 18, 1988]

Baltimore County, Maryland, et al., Defendants, by its undersigned attorneys, respectfully moves this Honorable Court to Amend the Interlocutory Order entered in these proceedings by the Court on October 13, 1988 and as grounds therefore state as follows:

1. On October 13, 1988, this Court entered in the above-entitled proceedings a Memorandum and Order denying the Defendants' Motion for Summary Judgment. The Defendants in these proceedings seek permission to take an immediate appeal under the provisions of Title 18, U.S.C., Section 1292(b). The above-described Order does not contain the statement that, under such Code Section, must be included before an appeal from any interlocutory Order may be taken. Therefore, pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure, the Defendants move the Court to amend such Order to include the following statement on the last page of said Order:

"In the opinion of the Court, this Order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and an immediate appeal from the Order may materially advance the ultimate termination of the litigation."

2. In support of this Motion, the Defendants respectfully represent to the Court as follows:

(a) The Order of this Court as aforesaid involves a controlling questions of law for the reasons that the rulings made by the Court in this Order incorporate previous rulings of the Court which hold that Baltimore County, Maryland, as a subdivision of the State of Maryland, has waived governmental immunity by the establishment of a program of self-insurance, which implied waiver of governmental immunity now exposes Baltimore County to liability under the pendent State law claims presented in this litigation. Further, the Order of this Court refuses to adjudicate the effect of the provisions of Sections 11-108 and 11-109 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland restricting the non-monetary damages that can be awarded in these proceedings. Further, the Opinion of this Court failed to address the immunity of Baltimore County, Maryland from damages under 42 U.S.C. Section 1983 in light of the materials presented in the body of the Motion for Summary Judgment demonstrating the non-existence of a policy, custom, practice or procedure of Baltimore County, Maryland that resulted in the constitutional deprivations alleged.

(b) A substantial ground for a difference of opinion as to such Order exists inasmuch as the United States Court of Appeals for the Fourth Circuit has conclusively determined that the existence of a program of self-insurance does not operate as an implied waiver of any existing State law based immunities. *See Westinghouse Electric Corp. v. West Virginia Department of Highways*, No. 87-2107 (4th Cir., 1988). Further, the Appellate Courts

have repeatedly held that a waiver of governmental immunity must be expressed and cannot be implied from the maintenance of a program of liability insurance. *See Snyder v. Dept. of Health, et al.*, 40 Md. App. 364 (1978). Similarly, this Court's ruling concerning immunity of necessity constitutes a ruling that the provisions of Sections 11-108 and 11-109 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland are inapplicable to the case at bar. By virtue of this Court's refusing to limit the scope of damages to the $350,000.00 limit imposed by these statutory provisions, this Court is in effect determining that these statutory provisions does not apply to actions such as the case at bar. Such a ruling is manifestly contrary to the specifically expressed intention and purpose of these by a statutory law, copies of which are attached hereto as Exhibit "A".

Further, this Court's rulings concerning the liability of Baltimore County, Maryland under 42 U.S.C. Section 1983 are contrary to the rulings of the United States Court of Appeals for the Fourth Circuit and the rulings of the Supreme Court of the United States in cases that are factually similar, if not identical, to the case at bar. *See Abshire v. Walls*, 830 F.2d 1277 (4th Cir., 1987); *Freedom v. City of Allentown, Pennsylvania*, 853 F.2d 1111 (3rd Cir., 1988); *Davidson v. Cannon*, 474 U.S. 344 (1986).

3. An immediate appeal from such Order will materially advance the ultimate termination of the litigation because an adjudication of these issues will result in a dismissal of these proceedings as to Baltimore County, Maryland and will control the scope of the proceedings and the scope of the Jury's deliberations, particularly with respect to the Jury's assessment of damages. If for no other reason, the resolution of these issues by the Court of Appeals will expedite the trial of these proceedings by giving to this Court guidance with respect to the

manner in which these issues are to be addressed during the course of the trial of these proceedings.

4. The Order is not otherwise appealable under Title 28, U.S.C. Section 1292.

5. The Defendants further move this Honorable Court for an Order staying furtner proceedings in this Court pending appeal by the Defendants from the above-described Order as amended, specifically continuing the trial date currently scheduled for November 2, 1988, at 9:30 a.m.

ARNOLD JABLON
County Attorney

JAMES G. BEACH, III
Assistant County Attorney

JOHN A. AUSTIN
Assistant County Attorney
Trial Bar No. 00776
Baltimore County Office of Law
2nd Floor, Old Courthouse
Towson, Maryland 21204
301/494-4420
Attorneys for Defendant,
Baltimore County, Maryland

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Chambers of
Joseph C. Howard
United States District Judge

101 W. Lombard Street
Baltimore, Maryland 21201-2678
(301) 962-7724
FTS 922-7724

October 24, 1988

James G. Beach, III
Assistant County Attorney
Baltimore County Office of Law
2nd Floor, Old Courthouse
Towson, Maryland 21204

Re: Buffington, et al. v. Baltimore County, Maryland, et al.
Civil No. JH-87-3284

Dear Mr. Beach:

The Court is in receipt of your "Motion to Stay Proceedings Pending Appeal" which was filed today. In your motion, you request a stay so that the Fourth Circuit can rule on the question of qualified immunity. Because you have *never* raised *that* issue in *this* Court, your motion is denied, and the case will proceed as scheduled on November 2, 1988 at 9:30 a.m.

Notwithstanding the informal nature of this ruling, it constitutes an Order of the Court.

Very truly yours,

/s/ Joseph C. Howard
JOSEPH C. HOWARD

JCH:dp

cc: William F. Gately, Esq.
Daniel W. Whitney, Esq.
Court file

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Harrison L. Winter
Chief Judge
United States Courthouse
101 W. Lombard Street
Baltimore, MD 21201-2664

October 28, 1988

Mr. John M. Greacen, Clerk
United States Court of Appeals
for the Fourth Circuit
United States Courthouse
Tenth & Main Streets
Richmond, VA 23219

Re: Barbara Buffington, et al. v. Baltimore County, et al.
Civil Action No. JH-87-3284

Dear Mr. Greacen:

I enclose for filing the original copy of a motion to stay proceedings pending appeal and a response on behalf of the plaintiffs.

I received the papers today and heard counsel in chambers this afternoon.

Because I am in agreement with the district court that the defense of qualified immunity has not been raised, and for the further reason that I do not see how qualified immunity applies in this case, I concluded to deny the stay.

Please prepare and enter an order to that effect.

Sincerely,

/s/ Harrison L. Winter
HARRISON L. WINTER
Chief Judge

HLW/bps
Enclosures

cc: Hon. Joseph C. Howard
United States Courthouse
101 W. Lombard Street
Baltimore, MD 21201

James G. Beach III, Esq.
Baltimore County Office of Law
Old Courthouse—Second Floor
Towson, MD 21204

Daniel W. Whitney, Esq.
Semmes, Bowen & Semmes
250 W. Pratt Street
Baltimore, MD 21201

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 88-1161 (L), 89-1021, 89-1040, 89-1054

BARBARA BUFFINGTON, *et al.*,
Appellees,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,
Appellants.

APPELLANTS' REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND

Carter G. Phillips
Mark D. Hopson
Kevin L. Kimball
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006

Arnold Jablon
Michael J. Moran
Thomas K. Farley
BALTIMORE COUNTY OFFICE
OF LAW
Second Floor
Towson, Maryland 21204

Robert M. Green
Charles M. Kerr
IRWIN, KERR, GREEN,
McDONALD AND DEXTER
250 West Pratt Street
Baltimore, Maryland 21201

Counsel for Appellants

November 27, 1989

* * * *

Applying these standards, the Sixth Circuit in *Danese* held that the "right of a detainee to be screened correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide" were not "particularized rights as required by *Anderson* and, thus, were not sufficient to deny the defendants qualified immunity." 875 F.2d at 1243-44. The court also held that the claims against the policy-making defendants in the case had to be dismissed because:

> [i]f the officers were not subject to a clearly established constitutional duty [to protect appellee from committing suicide], their supervisors cannot be liable for not training them to meet such a duty.

Id. at 1245. The holding of *Danese* with regard to qualified immunity is directly on point and, if applied, requires dismissal of all claims against the individual Appellants.

* * * *